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1st Session

SENATE

REPORT
No. 98-225

COMPREHENSIVE CRIME CONTROL ACT OF 1983

REPORT

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ON

S. 1762

together with

ADDITIONAL AND MINORITY VIEWS

SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1983.—Ordered to be printed

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COMPREHENSIVE CRIME CONTROL ACT OF 1983

SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1983.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1762]

The Committee on the Judiciary, to which was referred the bill (S. 1762) to make comprehensive reforms and improvements in the Federal criminal laws and procedures, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

GENERAL STATEMENT

The Comprehensive Crime Control Act of 1983 as reported by the Committee is the product of a decade long bipartisan effort of the Senate Committee on the Judiciary, with the cooperation and support of successive administrations, to make major comprehensive improvements to the Federal criminal laws. Significant parts of the measure, such as sentencing reform, bail reform, insanity defense amendments, drug penalty amendments, criminal forfeiture improvements, and numerous relatively minor amendments, have evolved over the almost two-decade consideration of proposals to enact a modern Federal criminal code.[1] In addition, specialized

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[1] See, e.g., S. 1630, 97th Cong., 2d Sess. (S. Rept. No. 97-307); *Reform of the Federal Criminal Laws*, Hearings before the Committee on the Judiciary, United States Senate, 96th-97th Cong., Parts XIV-XVI (1979-81) (hereinafter cited as Criminal Code Hearings); *Reform of the Federal Criminal Laws*, Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 92d-95th Cong., Parts I-XIII (1971-77) (hereinafter cited as Subcommittee Criminal Code Hearings); Final Report of the National Commission on Reform of Federal Criminal Laws (1971); Working Papers, National Commission on Reform of Federal Criminal Laws, Vols. I-III (1970).

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hearings have been held on numerous subjects covered by the bill, such as sentencing,[2] bail reform,[3] the insanity defense,[4] forfeiture,[5] extradition,[6] child pornography,[7] and pharmacy robbery.[8] Moreover, this bill contains, with little significant change, most of the provisions of the Violent Crime and Drug Enforcement Improvements Act of 1982 (S. 2572) that passed the Senate on September 30, 1982, by a vote of 95 to 1, as well as a number of relatively minor noncontroversial matters designed to make current Federal criminal laws more effective.

The Committee also noted the major contribution to this bill by the Administration. On March 16, 1983, the President sent to the Congress a 42-point proposal with sixteen major titles entitled, as is this bill, the "Comprehensive Crime Control Act of 1983" (S. 829). In transmitting the proposal to the Congress, the Administration noted that it was "intended to serve as a reference document to set out, in a comprehensive fashion, all of the various criminal justice legislative reforms needed to restore a proper balance between the forces of law and the forces of lawlessness." Six days of hearings on S. 829 and other related bills were held—4 days by the Subcommittee on Criminal Law, 1 day jointly by the Subcommittees on Criminal Law and Juvenile Justice, and 1 day on the Tort Claims Act amendments by the Subcommittee on Administrative Practice and Procedure.[9]

On July 21, 1983, the Committee ordered reported a bill consisting of twelve titles dealing with bail (title I), sentencing (title II), forfeiture (title III), the insanity defense and related procedures (title IV), drug penalties (title V), justice assistance (title VI), surplus Federal property for corrections purposes (title VII), labor racketeering (title VIII), foreign currency transactions (title IX), miscellaneous violent crime amendments (title X), miscellaneous nonviolent offenses (title XI), and procedure amendments (title XII).[10] Each of these titles is discussed in order in detail below.

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[2] Subcommittee Criminal Code Hearings, Part XIII.

[3] *Bail Reform,* Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. (1981).

[4] *The Insanity Defense,* Hearings before the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982); *Limiting the Insanity Defense,* Hearings before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982).

[5] *Forfeiture of Narcotics Proceeds,* Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, United States Senate, 96th Cong., 2d Sess. (1980).

[6] *Extradition Act of 1981,* Hearings before the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. (1981).

[7] *Child Pornography,* Hearing before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982).

[8] *Pharmacy Robbery Legislation,* Hearings before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982).

[9] *The Comprehensive Crime Control Act of 1983,* Hearings before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 98th Cong., 1st Sess. (1983) (hereinafter cited as Crime Control Act Hearings); *Title XIII of S. 829—To Amend the Federal Tort Claims Act,* Hearing before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 98th Cong., 1st Sess. (1983).

[10] To enhance the potential for ultimate enactment of a comprehensive crime bill, the Committee decided to deal with a number of the more controversial pending issues in separate legislation. Accordingly, bills on habeas corpus (S. 1763), exclusionary rule (S. 1764), capital punishment (S. 1765), and to establish an Office for the Director of National and International Drug Operations and Policy (S. 1787) were introduced and reported to the Senate on August 4, 1983 (see, 129 Cong. Rec. pp. S11679–S11713 (daily ed.).

TITLE I—BAIL REFORM

INTRODUCTION

Title I substantially revises the Bail Reform Act of 1966 [1] in order to address such problems as (a) the need to consider community safety in setting nonfinancial pretrial conditions of release, (b) the need to expand the list of statutory release conditions, (c) the need to permit the pretrial detention of defendants as to whom no conditions of release will assure their appearance at trial or assure the safety of the community or of other persons, (d) the need for a more appropriate basis for deciding on post-conviction release, (e) the need to permit temporary detention of persons who are arrested while they are on a form of conditional release or who are arrested for a violation of the Immigration and Nationality Act, and (f) the need to provide procedures for revocation of release for violation of the conditions of release. Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released. The adoption of these changes marks a significant departure from the basic philosphy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.

The provisions of this title derive from separate bail legislation reported by the Committee in the 97th Congress on March 4, 1982, S. 1554 (S. Rept. No. 97-317) and the 98th Congress on March 25, 1983, S. 215 (S. Rept. No. 98-147). The same basic provisions passed the Senate as title I of S. 2572 on September 30, 1982, by a vote of 95 to 1. This title consists of sections 101 through 109. Section 101 provides that this title may be cited as the "Bail Reform Act of 1983." Section 102 repeals sections 3141 through 3151 of current title 18, substitutes new sections 3141 through 3150, adds definitions of the terms "felony" and "crime of violence" to 18 U.S.C. 3156, and makes technical and conforming amendments to the remaining parts of chapter 207 of title 18. Section 103 adds a new 18 U.S.C. 3062 relating to general arrest authority for violation of release conditions and makes conforming amendments to chapter 203 of title 18. Section 104 amends 18 U.S.C. 3731 to permit the government to appeal release related decisions. Except as otherwise noted in the discussion of the new 18 U.S.C. 3141-3150 release provisions, sections 105-109 of this title make other technical and conforming amendments to title 18 and title 28 of the United States Code, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure. The following analysis is identified with the section numbers of the major new sections of title 18 of the United States Code rather than the section numbers of the title of this bill.[2]

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[1] 18 U.S.C. 3146 et seq.

SECTION-BY-SECTION ANALYSIS

SECTION 3141. RELEASE AND DETENTION AUTHORITY GENERALLY

This section specifies which judges have the authority to order the release of detention of persons pursuant to this chapter. Instead of using the term "bail", this provision and other provisions in this chapter use the term "release" in order to distinguish between money bond (i.e., "bail") and conditional release (often referred to as "release on bail"). Subsection (a) deals with release and detention authority pending trial, and provides that a judicial officer who is authorized to order the arrest of a person shall order that an arrested person brought before him be released pursuant to 18 U.S.C. 3041 or detained, pending judicial proceedings, pursuant to this chapter. The judicial officers authorized to arrest a person under 18 U.S.C. 3041 include any justice or judge of the United States, United States magistrate, and those State judicial officers who are authorized to arrest and commit offenders. Similar authority is set out in 18 U.S.C. 3141 under current law, although that portion of the present 18 U.S.C. 3141 which limits the authority to set bail in capital cases to judges of courts of the United States having original jurisdiction over the case has not been carried forward.

Release and detention authority pending sentence and appeal, which is addressed in subsection (b), is limited to a judge of a court having original jurisdiction over the offense, or a judge of a Federal appellate court. Although it would be inappropriate for a State judge or a magistrate to make a release determination after a Federal conviction, the current form of 18 U.S.C. 3141 makes no distinction between release authority pending trial and that after conviction, despite the fact that Rule 9(b) of the Federal Rules of Appellate Procedure requires that an application for release pending appeal be made in the first instance before the trial court.[3] Section 3141(b) resolves this ambiguity.

SECTION 3142. RELEASE OR DETENTION OF A DEFENDANT PENDING TRIAL

This section makes several substantive changes in the basic provisions of the Bail Reform Act of 1966. That Act, in 18 U.S.C. 3146, adopted the concept that in noncapital cases a person is to be ordered released pretrial under those minimal conditions reasonably required to assure his presence at trial. Danger to the community and the protection of society are not to be considered as release factors under the current law.

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[2] For an overview of studies on bail policy and a detailed discussion of the history and Federal court treatment of issues related to pretrial release, see S. Rept. No. 98-147, pp. 2-30.

[3] The advisory notes to Rule 9(b) of the Federal Rules of Appellate Procedure state that "[n]otwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. 3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court."

Considerable criticism has been leveled at the Bail Reform Act in the years since its enactment because of its failure to recognize the problem of crimes committed by those on pretrial release.[4] In just the past year, both the President[5] and the Chief Justice[6] have urged amendment of Federal bail laws to address this deficiency. In its final report, the Attorney General's Task Force on Violent Crime summarized what is increasingly becoming the prevalent assessment of the Bail Reform Act:[7]

> The primary purpose of the Act was to deemphasize the use of money bonds in the Federal courts, a practice which was perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants, and to provide a range of alternative forms of release. These goals of the Act—cutting back on the excessive use of money bonds and providing for flexibility in setting conditions of release appropriate to the characteristics of individual defendants—are ones which are worthy of support. However, 15 years of experience with the Act have demonstrated that, in some respects, it does not provide for appropriate release decisions. Increasingly, the Act has come under criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community.

The constraints of the Bail Reform Act fail to grant the courts the authority to impose conditions of release geared toward assuring community safety, or the authority to deny release to those defendants who pose an especially grave risk to the safety of the community. If a court believes that a defendant poses such a danger, it faces a dilemma—either it can release the defendant prior to trial despite these fears, or it can find a reason, such as risk of flight, to detain the defendant (usually by imposing high money bond). In the Committee's view, it is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants.

The concept of permitting an assessment of defendant dangerousness in the pretrial release decision has been widely supported, and has been specifically endorsed by such diverse groups as the American Bar Association,[8] the National Conference of Commissioners on Uniform State Laws,[9] the National District Attorneys Association,[10] and the National Association of Pretrial Service Agencies.[11] In addition, the laws of several States recognize the validity of weighing the issue of the risk a released defendant may pose to community safety,[12] and the release provisions of District of Columbia Code, passed by the Congress in 1970, specifically recognize that defendant dangerousness is an appropriate consideration in setting conditions of pretrial release and may also serve as a basis for pretrial detention.[13]

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[4] Criticism of the Bail Reform Act is set forth in H.R. Rept. No. 91-907, 91st Cong., 2d Sess. 87-104 (1970). See also generally materials set forth in *Amendments to the Bail Reform Act of 1966*, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess. (1969); *Preventive Detention*, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 91st Cong., 2d Sess. (1970); *Bail Reform*, Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. (1981) (hereinafter cited as Bail Reform Hearings).

[5] Address of President Reagan to the International Association of Chiefs of Police, September 28, 1981.

[6] Address of Chief Justice Burger to the American Bar Association, February 8, 1981.

[7] Final Report of the Attorney General's Task Force on Violent Crime, August 17, 1981, at 50-51. With some modification, all of the recommendations of the Attorney General's Task Force with respect to amendment of the Bail Reform Act are adopted in this chapter.

[8] American Bar Association, *Standards Relating to the Administration of Criminal Justice: Pretrial Release*, Standards 10-5.2, 10-5.8, and 10-5.9 (1978).

This broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release. In a recent study of release practices in eight jurisdictions, approximately one out of every six defendants in the sample studied were rearrested during the pretrial period—one-third of these defendants were rearrested more than once, and some were rearrested as many as four times.[14] Similar levels of pretrial criminality were reported in a study of release practices in the District of Columbia, where thirteen percent of all felony defendants released were rearrested. Among defendants released on surety bond, which under the District of Columbia Code, like the Bail Reform Act, is the form of release reserved for those defendants who are the most serious bail risks, pretrial rearrest occurred at the alarming rate of twenty-five percent.[15] The disturbing rate of recidivism among released defendants requires the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial.[16]

In facing the problem of how to change current bail laws to provide appropriate authority to deal with dangerous defendants seeking release, the Committee concluded that while such measures as permitting consideration of community safety in setting release conditions and providing for revocation of release upon the commission of a crime during the pretrial period may serve to reduce the rate of pretrial recidivism, and that these measures therefore should be incorporated in this chapter, there is a small but identifiable group of particularly dangerous defendants as to whom neither the impostion of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.

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[9] National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure*, Rule 341 (1974).

[10] National District Attorneys Association, *National Prosecution Standards: Pretrial Release*, Standard 10.8 (1977).

[11] National Association of Pretrial Service Agencies, *Performance Standards and Goals for Pretrial Release and Diversion*, Standard VII.

[12] Bail Reform Hearings, supra note 4, at 170-171 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[13] D.C. Code, sec. 23-1321 et seq.

[14] Lazar Institute, *Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact* 48 (Washington, D.C., August 1981).

[15] Institute for Law and Social Research, *Pretrial Release and Misconduct in the District of Columbia* 41 (April 1980) (hereinafter cited as the INSLAW Study).

[16] Consideration of defendant dangerousness in the pretrial release decision is currently permitted only in capital cases and may serve as the basis for denial of release. 18 U.S.C. 3148. The special conditions for release in capital cases under 18 U.S.C. 3148 were recently held in *United States* v. *Kennedy*, 617 F.2d 557 (9th Cir. 1980), to be derived from the particularly dangerous nature of such offenses and not the nature of the penalty, so that consideration of danger continued to be appropriate irrespective of the fact that the proscribed death penalty could not be imposed in light of *Furman* v. *Georgia*, 408 U.S. 238 (1972).

The decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. However, not only the interests of the defendant, but also important societal interests are at issue in the pretrial release decision. Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate. This rationale—that a defendant's interest in remaining free prior to conviction is, in some circumstances, outweighed by the need to protect societal interests—has been used to support court decisions which, despite the absence of any statutory provision for pretrial detention, have recognized the implicit authority of the courts to deny release to defendants who have threatented jurors or witnesses,[17] or who pose significant risks of flight.[18] In these cases, the societal interest implicated was the need to protect the integrity of the judicial process. The need to protect the community from demonstrably dangerous defendants is a similarly compelling basis for ordering detention prior to trial.

The concept of pretrial detention has been the subject of extensive debate.[19] It should be noted that the legislative history of the Bail Reform Act indicates that although the issue of pretrial detention was then recognized as "intimately related to the bail reform problem," the need to reform existing bail procedures was viewed as "so pressing that such reform should not be delayed with the hope of enacting more comprehensive legislation that might deal also with the preventive detention problem," and as a consequence, the issue of pretrial detention was reserved for "additional study." [20] Four years after the passage of the Bail Reform Act, the Congress did pass a preventive detention provision in the context of the District of Columbia Court Reform and Criminal Procedure Act of 1970; action to include a similar provision of general applicability in Federal criminal cases is overdue.

The Committee has given thorough consideration to the issues which have arisen during the lengthy debate over pretrial detention.[21] In particular, this consideration has focused on three questions: first, whether pretrial detention is constitutionally permissible; second, whether a preventive detention statute that is appropriately narrow in scope, and that provides necessarily stringent safeguards to protect the rights of defendants, will be sufficiently workable, as a practical matter, that it will be utilized to any significant degree; and third, whether the premise of a pretrial detention statute—that judges can predict with an acceptable degree of accuracy which defendants are likely to commit further crimes if released—is a reasonable one.

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[17] See *United States* v. *Wind*, 527 F.2d 672 (6th Cir. 1975); *United States* v. *Gilbert*, 425 F.2d 3 (D.C. Cir. 1969).

[18] *United States* v. *Abrahams*, 575 F.2d 3 (1st Cir.), cert. denied, 439 U.S. 821 (1978).

[19] See materials in Senate 1970 Hearings on Preventive Detention, *supra* note 4; Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act: The Next Step in Bail Reform*, 37 Brooklyn Law Review 277 (1971); Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L. J. 1140 (1972); Silbert and Rauh, *Criminal Laws and procedures: The District of Columbia Court Reform and Criminal Procedures Act of 1970*, 20 Am. U. L. Rev. 252 (1970–71).

[20] S. Rept. 89–750, 89th Cong., 1st Sess. 5 (1965).

[21] See materials in Bail Reform Hearings, *supra* note 4.

With respect to the first two questions, experience with the preventive detention provision of the District of Columbia Code [22] has been a useful reference. Although this statute was enacted in 1970, its constitutionality has been squarely addressed only recently. In *United States* v. *Edwards,*[23] the District of Columbia Court of Appeals *en banc* upheld the constitutionality of the statute. While the opinion of the court addressed a variety of constitutional issues, the decision focused on, and ultimately rejected, the two most commonly raised arguments that pretrial detention is unconstitutional: that the Eighth Amendment's prohibition on excessive bail impliedly guarantees an absolute right to release pending trial, and that pretrial detention is violative of the Due Process Clause of the Fifth Amendment in that it permits punishment of a defendant prior to an adjudication of guilt. In its review of the Eighth Amendment issue, the court exhaustively examined both the origins of the excessive bail clause and case law interpreting it, and concluded that the purpose of the amendment was to limit the discretion of the judiciary in setting money bail in individual cases, and not to limit the power of the Congress to deny release for certain crimes or certain offenders.[24] With respect to the Due Process issue, the court concluded, correctly in the view of the Committee, that pretrial detention is not intended to promote the traditional aims of punishment such as retribution or deterrence, but rather that it is designed "to curtail reasonably predictable conduct, not to punish for prior acts," and thus, under the Supreme Court's decision in *Bell* v. *Wolfish,* is a constitutionally permissible regulatory, rather than a penal, sanction.[25]

Based on its own constitutional analysis and its review of the *Edwards* decision, the Committee is satisfied that pretrial detention is not *per se* unconstitutional. However, the Committee recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

Whether a pretrial detention statute would in practice be of the utility argued by its proponents was an issue which had previously concerned the Committee in light of the fact that, in the past, the pretrial detention provision of the District of Columbia Code was rarely used.[26] However, in recent years, the use of this provision has been significantly expanded, in part because its constitutionality has been resolved by the local courts and in part because prosecutors are learning how to use it more efficiently and effectively.[27]

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[22] D.C. Code, sec. 23-1322.

[23] 430 A. 2d 1321 (D.C. App., 1981) (en banc), cert. denied, 455 U.S. 1022 (1982).

[24] *Id.* at 1325-1331.

[25] *Id.* at 1331-1333. In *Bell* v. *Wolfish,* 441 U.S. 520 (1979), the Court rejected the contention of persons detained prior to trial that certain conditions of their confinement constituted punishment that was impermissible under the Fourth Amendment and violative of the presumption of innocence, two arguments parallel to those frequently raised in opposition to pretrial detention generally. The petitioners did not attack the constitutionality of the initial decision to detain and the Court specifically reserved any determination of this issue. 441 U.S. at 534 and n. 15.

[26] S. Rept. No. 96-553, 96th Cong., 2d Sess., 1073 (1980).

An additional concern of the Committee, in assessing the practical utility of a pretrial detention statute, was the argument that stringent financial conditions of release, believed by many now to be used indirectly to detain dangerous defendants, would be used to avoid the limitations and procedural requirements that would necessarily be incorporated in a provision that directly authorized pretrial detention.[28] Senator Kennedy, in particular, is of the view that *current* bail procedures often result in pretrial detention through the arbitrary use of high money bail as a way to assure a defendant's incarceration. The Committee concluded that, by providing both a workable pretrial detention statute and restrictions on the use of financial conditions of release, this problem could be effectively addressed. This issue is discussed in further detail below.

The question whether future criminality can be predicted, an assumption implicit in permitting pretrial detention based on perceived defendant dangerousness, is one which neither the experience under the District of Columbia detention statute nor empirical analysis can conclusively answer. If a defendant is detained, he is logically precluded from engaging in criminal activity, and thus the correctness of the detention decision cannot be factually determined. However, the presence of certain combinations of offense and offender characteristics, such as the nature and seriousness of the offense charged, the extent of prior arrests and convictions, and a history of drug addiction, have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release.[29] While predictions which attempt to identify those defendants who will pose a significant danger to the safety of others if released are not infallible, the Committee believes that judges can, by considering factors such as those noted above, make such predictions with an acceptable level of accuracy.

Predictions of future behavior with respect to the issue of appearance are already required in all release decisions under the Bail Reform Act, yet one study on pretrial release suggests that pretrial rearrest may be susceptible to more accurate prediction than nonappearance.[30] Furthermore, as noted in testimony before the Committee,[31] current law authorizes judges to detain defendants in capital cases and in post-conviction situations based on predictions of future misconduct.[32] Similarly, a Federal magistrate may detain a juvenile under 18 U.S.C. 5034 pending a juvenile delinquency proceeding in order to assure the safety of others. The Committee agrees that there is no reason that assessments of the probability of future criminality should not also be permitted in the case of adult defendants awaiting trial.

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[27] Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, United States House of Representatives, 97th Cong., 1st Sess., July 29, 1981 (testimony of Charles Ruff, United States Attorney for the Distict of Columbia).

[28] Use of high money bond to detain defendants has been cited as the reason for the infrequent use of the D.C. Code pretrial detention statute over much of its history. INSLAW study, *supra* note 15 at 45.

[29] INSLAW study, *supra* note 15.

[30] *Id.* at 63–64.

[31] Bail Reform Hearings, *supra* note 4, at 169, 174–175 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[32] 18 U.S.C. 3146.

In sum, the Committee has concluded that pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released.

While providing statutory authority for pretrial detention is a substantial change in Federal law, it is well known that a substantial minority of Federal defendants in the past have in fact been detained pending trial, primarily because of an inability to meet conditions of release.[33] Under the Bail Reform Act, it is permissible for a defendant to be detained if he is unable to meet conditions of release that have been determined by a judge to be reasonably necessary to assure his appearance. However, it has been suggested that the phenomenon of pretrial detention under the Bail Reform Act is often the result of intentional imposition of excessively stringent release conditions, and in particular extraordinarily high money bonds, in order to achieve detention. Furthermore, it has been suggested that in many cases, while the imposition of such conditions has apparently been for the purpose of assuring the defendant's appearance at trial, the underlying concern has been the need to detain a particularly dangerous defendant, a concern which the Bail Reform Act fails to address.

Although there is a question of the extent to which the authority to set conditions of release may have been abused to achieve detention of particularly dangerous defendants, in view of the Bail Reform Act's failure to give judges any mechanism to address the inevitable and appropriate concern they would have about releasing an arrested person who appears to pose a serious risk to community safety, it is, as recently noted by Senator Hatch, "[n]o wonder many judges laboring under this law admit using 'extreme rationalizations in circumventing' this policy." [34] A similar view of this problem was expressed in testimony of the Department of Justice:

> That such instances of *de facto* detention of dangerous defendants would occur is hardly surprising. * * * [C]urrent law places our judges in a desperate dilemma when faced with a clearly dangerous defendant seeking release. On the one hand, the courts may abide by the letter of the law and order the defendant released subject only to conditions that will assure his appearance at trial. On the other hand, the courts may strain the law, and impose a high money bond ostensibly for the purpose of assuring appearance, but actually to protect the public. Clearly, neither alternative is satisfactory. The first leaves the com-

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[33] In a study assessing the demonstration pretrial services agencies established under 18 U.S.C. 3152, of 31,108 Federal defendants, 4,766 (approximately fifteen percent) were never released. Administrative Office of the United States Courts, *Fourth Report on the Implementation of the Speedy Trial Act, Title II*, June 29, 1979 at Table III–1.

[34] Bail Reform Hearings, *supra* note 4, at 154 (statement of Senator Orrin G. Hatch).

> munity open to continued victimization. The second, while it may assure community safety, casts doubt on the fairness of release practices.[35]

The Committee does not sanction the use of high money bonds to detain dangerous defendants; but criticism of this practice should be focused not on the judiciary, but rather on the deficiencies of the law itself, and indeed, on the delay in amending the law to cure this problem.

Providing statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively. It would also be fairer to the defendant than the indirect method of achieving detention through the imposition of financial conditions beyond his reach. The defendant would be fully informed of the issue before the court, the government would be required to come forward with information to support a finding of dangerousness, and the defendant would be given an opportunity to respond directly. The new bail procedures promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well.

It is the intent of the Committee that the pretrial detention provisions of section 3142 are to replace any existing practice of detaining dangerous defendants through the imposition of excessively high money bond. Because of concern that the opportunity to use financial conditions of release to achieve pretrial detention would provide a means of circumventing the procedural safeguards and standard of proof requirements of a pretrial detention provision, the Committee was urged to do away with money bond entirely.[36] Indeed, section 3142 of this bill as introduced in the 97th Congress did not provide for imposition of financial conditions of release. While the retention of money bond does create the potential for such abuse, the Senate concluded last year, after consideration of arguments for continuing to provide discretion to impose financial conditions of release, that the abolition of money bond is not justified. Instead, the bill assures the goal of precluding detention through use of high money bond by stating explicitly that "[t]he judge may not impose a financial condition that results in the detention of the person." [37] Retention of money bond was recommended by the Department of Justice, which noted that money bond has historically been one of the primary methods of securing the appearance of defendants and that this form of release has proved to be an effective deterrent to flight for certain defendants.[38]

The core pretrial detention provisions of section 3142 are set out in subsections (e) and (f). These and the other subsections of section 3142 are each discussed in detail below. Although section 3142—by permitting the consideration of dangerousness generally and by providing, in limited circumstances, for pretrial detention—represents a significant departure from the Bail Reform Act, many improvements made by the Bail Reform Act have been retained.

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[35] *Id.* at 177 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[36] *Id.* at 215–221 (testimony of Bruce D. Beaudin, Director, D.C. Pretrial Services Agency).

[37] Section 3142(c).

[38] Bail Reform Hearings, *supra* note 4, at 194–195 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

Subsection (a) provides that when a person charged with an offense is brought before a judicial officer, the judicial officer is required to pursue one of four alternative courses of action. He may release the person on his personal recognizance, or upon his execution of an unsecured appearance bond, pursuant to section 3142(b); he may release the person subject to one or more of the conditions listed in subsection (c); he may, if the arrested person is already on a form of conditional release or may be subject to deportation or exclusion order, temporarily detained the person pursuant to subsection (d); or he may pursuant to subsection (e), order the detention of the person. The first two forms of pretrial release are like those now set forth in the Bail Reform Act.[39] It is anticipated that they will continue to be appropriate for the majority of Federal defendants. Neither detention provision has a precedent in the Bail Reform Act, although there are similar provisions now incorporated in the District of Columbia Code.[40]

Subsection (b) requires the judicial officer to release the person on his own recognizance, or upon execution of an unsecured appearance bond in a specified amount, unless the judicial officer determines that such release will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community. Like the current section 18 U.S.C. 3146(a), subsection (a) emphasizes release on personal recognizance or unsecured appearance bond for persons who are deemed to be good pretrial release risks. However, unlike current law, in making the determination whether release under this subsection is appropriate, the judicial officer is to consider not only whether these forms of release are adequate to assure the appearance of the defendant, but also whether they are appropriate in light of any danger the defendant may pose to others. As discussed above, the Committee has determined that danger to the community is as valid a consideration in the pretrial release decision as is the presently permitted consideration of risk of flight. Thus, subsection (a), like the other provisions of section 3142, places the consideration of defendant dangerousness on an equal footing with the consideration of appearance.

The concept of defendant dangerousness is described throughout this chapter by the term "safety of any other person or the community." The reference to safety of any other person is intended to cover the situation in which the safety of a particular identifiable individual, perhaps a victim or witness, is of concern, while the language referring to the safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community. The Committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence. This principle was recently endorsed in *United States* v. *Provenzano and Andretta,*[41] in which it was held that the concept of "danger" as used in current 18 U.S.C. 3148 extended to nonphysical harms such as corrupting a union. The Committee also emphasizes that the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the "safety of any other person or the community."[42]

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[39] 18 U.S.C. 3146(a).

[40] D.C. Code, sec. 23-1322.

[41] 605 F. 2d 85 (3d Cir. 1979).

If released under subsection (a) a person is subject to the mandatory condition that he not commit a Federal, State, or local crime while on release. Persons released under the discretionary conditions set out in subsection (c) are also subject to this mandatory condition, which is new to the law. While it may be self-evident that society expects all of its citizens to be law-abiding, it is particularly appropriate, given the problem of crimes committed by those on pretrial release, that this requirement be stressed to all defendants at the time of their release.[43] In addition, the establishment of probable cause to believe that a person on pretrial release has committed a crime will be sufficient to trigger the provisions of section 3148 in this chapter, permitting revocation of release and the use of the court's contempt power.

Subsection (c) provides that if the judicial officer determines that release on personal recognizance or unsecured appearance bond will not reasonably assure the appearance of the person or will endanger the safety of any other person or the community, the person may be released subject to the mandatory condition that he not commit an offense while on release, and subject to the least restrictive condition, or combination of conditions, set out in subsection (c)(2) that will provide such assurance. Except for financial conditions that can be utilized only to assure appearance, any of the discretionary conditions listed in subsection (c)(2) may be imposed either to assure appearance or to assure community safety.

Current 18 U.S.C. 3146 sets forth five specific conditions, including a catch-all permitting imposition of "any other condition deemed reasonably necessary to assure appearance as required." [44] The Committee has determined to maintain these five conditions with only minor modifications, and to increase the number of explicitly stated conditions by adding nine more. Although each of the additional conditions could appropriately be imposed today under the catch-all in current law, spelling them out in detail is intended to encourage the courts to utilize them in appropriate circumstances. Under utilization of some of these conditions today may occur because they are more relevant to the question of danger to the community than they are to the risk of flight. Since the court will be allowed to consider danger to the community in setting release conditions, some of these specified conditions will become of more utility, being more directly related to this new basis for qualifications on release.

It must be emphasized that all conditions are not appropriate to every defendant and that the Committee does not intend that any of these conditions be imposed on all defendants, except for the mandatory condition set out in subsection (c)(1). The Committee intends that the judicial officer weigh each of the discretionary conditions separately with reference to the characteristics and circumstances of the defendant before him and to the offense charged, and with specific reference to the factors set forth in subsection (g).

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[42] Risk of continued drug activity is currently considered a danger to the community or other persons under current 18 U.S.C. 3148. See, e.g., *United States* v. *Hawkins*, 617 F. 2d 59 (5th Cir.), cert. denied, 449 U.S. 952 (1980).

[43] This concept was endorsed in the commentary to the Uniform Rules of Criminal Procedure, *supra* note 9 at 64, citing an Arizona case to the effect that it is permissible to condition the pretrial release, by a requirement that the defendant conduct himself as a law-abiding citizen, *State of California* v. *Cassius*, 110 Ariz. 485 (1974).

[44] 18 U.S.C. 3146(a)(5).

The first condition explicitly set forth in subsection (c)(2) is the familiar third party custodian provision of existing 18 U.S.C. 3146(a)(1), with one major change. The Committee endorses the use of third party custodians in appropriate cases. However, the Committee is aware of some recent criticism of the practice that indicates a high incidence of rearrest for those released to third party custodians in the District of Columbia.[45] To assure that third party custodians are chosen with care, the condition has been amended to require that the custodian agree to report any violation of a release condition and that he be reasonably able to assure the judge that the person will appear as required and that he will not pose a danger to the safety of any other person or the community. It is not intended by this provision that the custodian be held liable if the person to be supervised absconds or commits crimes while under the custodian's supervision. Rather it is intended to alert the judicial officer to the necessity of inquiring into the ability of proposed custodians to supervise their charges and to impress on the custodians the duty they owe to the court and to the public to carry out the supervision to which they are agreeing and to report any violations to the court.

Conditions set out in subparagraphs (B), (F), (H), (I), and (J) are new and deal respectively with employment or the active seeking of employment, reporting on a regular basis to a designated law enforcement officer, refraining from possessing dangerous weapons, refraining from excessive use of alcohol or any use of a controlled substance without a prescription, and undergoing available medical or psychiatric treatment. The conditions set out in subparagraph (C), dealing with maintaining or commencing an educational program, complements the condition concerning employment, for it recognizes that, particularly among youthful offenders, lack of basic education often significantly impairs their ability to find employment. The Committee believes that in appropriate cases each of these conditions is applicable to individual defendants on the issues of flight or assuring community safety.

The condition in subparagraph (D) deals with restrictions on travel, associations, and place of abode, and is drawn without substantive change from existing 18 U.S.C. 3146(a)(2).

Under subparagraph (G), a person may be required to abide by a specific curfew. Although this is a new provision, it is similar in purpose to the traditional conditions restricting travel and association.

The condition in subparagraph (E) is also new. It requires that, when imposed, the defendant avoid all contact with alleged victims of the crime and potential witnesses who may testify concerning the offense. It is a continuing complaint that victims and witnesses are intimidated by those released on bond[46] and, indeed, under current law, pretrial detention appears appropriate if witnesses are threatened.[47] This condition enables the court to raise the issue with the defendant before actual intimidation has occurred. In addition, in all releases the court will now be required to warn the defendant of the provisions of 18 U.S.C. 1503 (relating to the intimidation of witnesses, jurors, and officers of the court) and 18 U.S.C. 1510 (relating to destruction of criminal investigation) at the time of initial release.[48] Protecting against witness intimidation is most important to the fair and impartial administration of criminal justice. This condition should be imposed whenever the circumstances are such that the judge believes any form of victim or witness intimidation may occur.

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[45] The INSLAW study, *supra* note 15 at 54, 58, found that defendants released to third-party custodians seemed more likely to be rearrested than were defendants on other forms of pretrial release.

The condition in subparagraph (K), although similar to the ten percent appearance bond condition set out in the current 18 U.S.C. 3146(a)(3), is designed to provide greater flexibility to the court in setting financial conditions of release. The concept of an appearance bond is retained, but the court has the discretion to determine what percentage of the amount of the bond is to be posted with the court. Where there is a substantial risk of flight, the judicial officer may require the posting of the entire amount. As an alternative to the posting of money, the court may require the execution of an agreement to forfeit designated property. When this alternative is employed the indicia of ownership of the property, such as the title to a car or the deed to real property, is to be posted with the court. A party other than the defendant may post money or execute an agreement to forfeit designated property under this paragraph, but in such a case the judicial officer would first ascertain whether the prospect of forfeiture by the third party would be sufficient to assure the appearance of the defendant. Generally such assurance will exist where there is a close relationship between the defendant and the third party, such as a family tie.

Subparagraph (L) carries forward the surety bond condition set forth in the current 18 U.S.C. 3146(a)(4). While the Committee is aware of criticism of the surety bond system generally, and of the recommendation of the American Bar Association to abolish the use of commercial sureties,[49] the surety bond option has been retained. However, the obligation of commercial sureties to assure the appearance of their clients, and, if necessary, actively to maintain contact with them during the pretrial period, is emphasized.

As discussed above, the Committee was urged in the last Congress to abolish financial conditions of release in order to insure that imposition of excessively high bonds was not used to achieve the detention of dangerous defendants. Although the Committee and the Senate decided to retain financial conditions of release, concern about the potential for such abuse does exist. Consequently, the use of the conditions of release set out in sections

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[46] In general see *Reducing Victim/Witness Intimidation: A Package*, American Bar Association, Section of Criminal Justice Committee on Victims (1979).

[47] See *United States* v. *Gilbert* and *United States* v. *Wind*, *supra* note 17.

[48] Section 3502(f).

[49] ABA Standards on Pretrial Release, *supra* note 8, Standard 10-1.3(c).

3142(c)(2)(K) and 3142(c)(2)(L) is specifically limited to the purpose of assuring the appearance of the defendant.[50]

In addition, section 3142(c) provides that a judicial officer may not impose a financial condition of release that results in the pretrial detention of the defendant. The purpose of this provision is to preclude the sub rosa use of money bond to detain dangerous defendants. However, its application does not necessarily require the release of a person who says he is unable to meet a financial condition of release which the judge has determined is the only form of conditional release that will assure the person's future appearance. Thus, for example, if a judicial officer determines that a $50,000 bond is the only means, short of detention, of assuring the appearance of a defendant who poses a serious risk of flight, and the defendant asserts that, despite the judicial officer's finding to the contrary, he cannot meet the bond, the judicial officer may reconsider the amount of the bond. If he still concludes that the initial amount is reasonable and necessary then it would appear that there is no available condition of release that will assure the defendant's appearance. This is the very finding which, under section 3142(e), is the basis for an order of detention, and therefore the judge may proceed with a detention hearing pursuant to section 3142(f) and order the defendant detained, if appropriate. The reasons for the judicial officer's conclusion that the bond was the only condition that could reasonably assure the appearance of the defendant, the judicial officer's finding that the amount of the bond was reasonable, and the fact that the defendant stated that he was unable to meet this condition, would be set out in the detention order as provided in section 3142(i)(1). The defendant could then appeal the resulting detention pursuant to section 3145.

Subparagraph (M) authorizes the judicial officer to condition release on the detainee's return to custody for specified hours following release for employment, schooling, or other limited purposes.

The condition set out in subparagraph (N) of section 3142(c)(2) tracks the catch-all provision of the current form of 18 U.S.C. 3146(a)(5), and permits the imposition of any other condition that is reasonably necessary to assure the appearance of the person as required and the safety of any other person and the community.

The final sentence of section 3142(c) retains the authority now set forth in 18 U.S.C. 3146(e) for the court to amend the release order at any time to impose different or additional conditions of release. This authorization is based on the possibility that a changed situation or new information may warrant altered release conditions. It is contemplated by the Committee that the imposition of additional or different conditions may occur at an ex parte hearing in situations where the court must act quickly in the interest of justice. In such a case, a subsequent hearing in the defendant's presence should be held promptly.[51] Either the defendant or the government may move for an amendment of conditions, or the court may do so on its own motion.[52]

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[50] In any event, a defendant who is a danger to the community remains dangerous even if he has posted a substantial money bond.

[51] Prior to establishing such new conditions, and prior to a hearing thereon, the court may revoke the defendant's release and order him arrested. *United States* v. *Gamble*, 295 F. Supp. 1192 (S.D. Tex. 1969).

Subsection (d) permits a judicial officer to detain a defendant for a period of up to ten days if it appears that the person is already in a conditional release status or is not a citizen of the United States or lawfully admitted for permanent residence under the Immigration and Naturalization Act, and the judicial officer further determines that the person may flee or pose a danger to any other person or to the community if released. The provision applies if the defendant, at the time of apprehension was on pretrial release for a Federal, State, or local felony; was on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or was on probation or parole for any Federal, State, or local offense; or was not a citizen of the United States or a lawful permanent resident. The ten-day period is intended to give the government time to contact the appropriate court, probation, or parole official, or immigration official and to provide the minimal time necessary for such official to take whatever action on the existing conditional release that official deems appropriate. This provision is based largely on a provision for a five-day hold in similar circumstances that is now the law in the District of Columbia. The Committee deems five days to be too short a period in which to expect proper notification and appropriate action by the original releasing body and thus has opted for ten days. It should also be noted that the District of Columbia measure is in effect a local provision and most of those under arrest to whom it applies are likely to be released either pretrial in the District of Columbia or be on parole or probation for a District offense; thus notification and appropriate action might more easily occur within the five day period. The Federal bail law, on the other hand, has national application, and in individual cases there will be need to consult and notify over longer distances; thus the time frame of ten days was adopted. While a deprivation of liberty of up to ten days is a serious matter, it must be balanced against the fact that the defendant has been arrested based on probable cause to believe that he has committed a crime, the fact that he is either already on conditional release, presumably subject to revocation for a prior offense or he is not in conformity with immigration laws, and the fact that the court must find that he may flee or pose a danger to any other person or to the community if released. On balance the Committee concluded that a detention of up to ten days in those circumstances is warranted and is in the interests of justice.

As specified by the last sentence of subparagraph (d), an individual temporarily detained under (1)(B) has the burden to demonstrate to the court that he is a citizen or a lawful permanent resident.

Subsections (e) and (f) set forth the findings and procedures that are required for an order of detention. The standard for an order of detention of a defendant prior to trial is contained in subsection (e), which provides that the judicial officer is to order the person detained, if, after a hearing pursuant to subsection (f), he finds that no condition or combination of conditions of release will reasonably assure the appearance of the defendant as required and the safety of any other person and the community. The facts on which the finding of dangerousness is based must, under subsection (f), be supported by clear and convincing evidence. Thus, this subsection not only codifies existing authority to detain persons who are serious flight risks,[53] but also, as discussed extensively above, creates new authority to deny release to those defendants who are likely to engage in conduct endangering the safety of the community even if released pending trial only under the most stringent of the conditions listed in section 3142(c)(2).

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[52] Authority for the government to seek amendment of release conditions is likely implicit in current 18 U.S.C. 3146(e). See *United States* v. *Zuccaro*, 645 F.2d 104 (2d cir. 1981).

For good reason the bill does not incorporate, as a precondition of pretrial detention, a finding that there is a "substantial probability" that the defendant committed the offense for which he is charged.[54] This "substantial probability" requirement was construed by the District of Columbia Court of Appeals in *United States* v. *Edwards, supra,* as being "higher than probable cause" and "equivalent to the standard required to secure a civil injunction."[55] However, as noted by the Department of Justice, the *Edwards* opinion strongly suggests that the probable cause standard consistently sustained by the Supreme Court as a basis for imposing "significant restraints on liberty" would be constitutionally sufficient in the context of ordering pretrial detention.[56] The Department pointed out that the burden of meeting the "substantial probability" requirement of the District of Columbia's pretrial detention statute was the principal reason cited by prosecutors for the failure, over much of the last ten years, to request pretrial detention hearings under that statute.

While this "substantial probability" requirement might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted, the Committee is satisfied that the fact that the judicial officer has to find probable cause will assure the validity of the charges against the defendant, and that any additional assurance provided by a "substantial probability" test is outweighed by the practical problems in meeting this requirement at the stage at which the pretrial detention hearing is held.[57] Thus, this chapter contains no "substantial probability" finding.

In determining whether any form of conditional release will resonably assure the appearance of the defendant and the safety of other persons and the community, the judicial officer is required to consider the factors set out in section 3142(g). The offense and offender characteristics that will support the required finding for pretrial detention under subsection (e) will vary considerably in each case. Thus the Committee has, for the most part, refrained from specifying what kinds of information are a sufficient basis for the denial of release, and has chosen to leave the resolution of this question to the sound judgment of the courts acting on a case-by-case basis. However, the bill does describe two sets of circumstances under which a strong probability arises that no form of conditional release will be adequate.

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[53] *United States* v. *Abrahams, supra* note 18.

[54] D.C. Code, sec. 23-1322(b)(2)(C).

[55] *United States* v. *Edwards, supra* note 23 at 1339.

[56] Bail Reform Hearings, *supra* note 4 at 189-191 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[57] Because of the requirements of Rules 4(a) and 5(a) of the Federal Rules of Criminal Procedures, probable cause that the defendant committed the offense with which he is charged must be established either prior to, or at the time of, the initial appearance. Furthermore, the issue of probable cause will subsequently be reexamined in the course of a prelminary hearing or in proceedings leading to the filing of an indictment.

The first of these arises when it is determined that a person charged with a seriously dangerous offense has in the past been convicted of committing another serious crime while on pretrial release. Such a history of pretrial criminality is, absent mitigating information, a rational basis for concluding that a defendant poses a significant threat to community safety and that he cannot be trusted to conform to the requirements of the law while on release. Section 3142(e) provides, therefore, that in a case in which a defendant is charged with one of the serious offenses described in section 3142(f)(1) (a crime of violence, a crime punishable by death, a crime for which the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Import and Export Act (21 U.S.C. 951) or Sec. 1 of the Act of Sept. 15, 1980 (21 U.S.C. 955a)), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community, if the judicial officer finds: (1) that the defendant had been convicted of another offense described in subsection (f)(1) (or a State or local offense that would have been such an offense if circumstances giving rise to Federal jurisdiction had existed); (2) that this offense was committed while the person was on pretrial release; and (3) that no more than five years have elapsed since the date of conviction, or the defendant's release from imprisonment, for the offense, whichever is later. The Committee believes that it is appropriate in such circumstances that the burden shift to the defendant to establish a basis for concluding that there are conditions of release sufficient to assure that he will not again engage in dangerous criminal activity pending his trial. The term "crime of violence" is defined in Section 3156, as amended by this title.

The Committee notes, moreover, that a case may involve circumstances that, while not set forth in the section as a basis for a rebuttable presumption of dangerousness, nevertheless are so strongly suggestive of a person's willingness or inclination to resort to criminal violence as to warrant the inference that the person would be a danger to society even if released on the most restrictive conditions. The Committee has in mind, for example, the case of a person charged with an offense involving the possession or use of a destructive device. In the Committee's view, it would be difficult not to regard as an unreasonable risk to the safety of others a person who uses such a weapon in the course of committing a crime, or who possesses it under circumstances indicating a readiness or willingness to use it to carry out the crime.

The second rebuttable presumption arises in cases in which the defendant is charged with felonies punishable by ten years or more of imprisonment described in 21 U.S.C. 841, 952(a), 953(a), 955, and 959 which cover opiate substances and offenses of the same gravity involving non-opiate controlled substances, or an offense under 18

U.S.C. 924(c) which covers the use of a firearm to commit a felony. These are serious and dangerous Federal offenses. The drug offenses involve either trafficking in opiates or narcotic drugs, or trafficking in large amounts of other types of controlled substances. It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses.[58] Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers. In view of these factors, the Committee has provided in section 3142(e) that in a case in which there is probable cause to believe that the person has committed a grave drug offense, a rebutable presumption arises that no condition or combination of conditions will reasonably assure the appearance of the person and the safety of the community.[59] Similar obvious considerations based upon the inherent dangers in committing a felony using a firearm support a rebuttable presumption for detention.

Subsection (f) specifies the cases in which a detention hearing is to be held and delineates the procedures applicable in such a hearing. Paragraphs (1) and (2) of subsection (f) describe the circumstances in which a pretrial detention hearing is required. Because detention may be ordered under section 3142(e) only after a detention hearing pursuant to subsection (f), the requisite circumstances for invoking a detention hearing in effect serve to limit the types of cases in which detention may be ordered prior to trial.

A pretial detention hearing to determine whether there is any form of conditional release that will reasonably assure the appearance of the defendant as well as the safety of any other person and the community shall be held upon the motion of the government in a case in which the defendant is charged with an offense described in subsection (f)(1). The offenses set forth in subsection (f)(1) (A) through (C) are crimes of violence, offenses punishable by life imprisonment or death, or offenses for which a maximum 10-year imprisonment is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act or Section 1 of the Act of September 15, 1980. These offenses are essentially the same categories of offenses described in the District of Columbia Code by the terms "dangerous crime" and "crime of violence" for which a detention hearing may be held under that statute.[60] Subsection (f)(1) (A) through (C) describes those offenses which comprise the greatest risk to community safety. The Committee has determined that whenever a person is charged with one of these offenses and the attorney for the government elects to seek pretrial detention, a hearing should be held so that the judicial officer will focus on the issue of whether, in light of the seriousness of the offense charged and the other factors to be considered under subsection (g), any form of conditional release will be adequate to address the potential danger the defendant may pose to others if released pending trial. Because the requirements of subsection (e) must be met before a defendant may be detained, the fact that the defendant is charged with an offense described in subsection (f)(1) (A) through (C) is not, in itself, sufficient to support a detention order. However, the seriousness of the offenses described in subsection (f)(1) (A) through (C) coupled with the government motion is a sufficient basis for requiring an inquiry into whether detention may be necessary to protect the community from the danger that may be posed by a defendant charged with one of these crimes.

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[58] Bail Reform Hearings, *supra* note 4 at 56–60. (Testimony of Senator Lawton Chiles).

[59] The concept of danger to the safety of the community includes drug trafficking. See *United States* v. *Hawkins*, *supra* note 42.

Under (f)(1), a detention hearing may also be sought when a defendant charged with a serious offense has a substantial history of committing dangerous offenses. Specifically, the category described in subsection (f)(1)(D) refers to those cases in which a person charged with a felony has been previously convicted of two or more of the particularly serious offenses described in subsection (f)(1) (A) through (C) or of State or local offenses that would have been offenses described in subsection (f)(1) (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed. This sort of criminal history is strongly indicative of a defendant's dangerousness, and thus is an adequate basis for convening a pretrial detention hearing.

Under subsection (f)(2), a pretrial detention hearing may be held upon motion of the attorney for the government or upon the judicial officer's own motion in two types of cases. The two types of cases involve either a serious risk that the defendant will flee, or a serious risk that the defendant will obstruct justice, or threaten, injure, or intimidate a prospective juror or witness, or attempt to do so, and reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.[61]

Statutory authority to permit the judicial officer to move for a pretrial detention hearing under the circumstances described in subsection (f)(2) makes it clear that the judicial officer who believes that there may be a basis for denying release should not be foreclosed from addressing this concern absent a motion for a detention hearing by the government.

If a detention hearing is justified because of the existence of circumstances described in subsection (f)(1) or (f)(2), the hearing is to be held immediately upon the person's first appearance before the judicial officer unless a continuance is sought by either the defendant or the government. Although a continuance may be necessary for either the defendant or the government to prepare adequately for the hearing, particularly if the defendant was arrested soon after the commission of the offense with which he is charged, the period of a continuance sought by the defendant and of one sought by the government is confined to five and three days, respectively, in light of the fact that the defendant will be detained during such a continuance. An extension of the continuance may be granted, however, for good cause. These time limitations are the same as those now incorporated in the pretrial detention provision of the District of Columbia Code.[62]

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[60] D.C. Code, secs. 23-1322(a), 23-1331(3) and 23-1331(4).

[61] *United States* v. *Gilbert* and *United States* v. *Wind*, *supra* note 17: *United States* v. *Abrahams*, *supra* note 18.

The procedural requirements for the pretrial detention hearing set forth in section 3142(f) are based on those of the District of Columbia statute [63] which were held to meet constitutional due process requirements in *United States* v. *Edwards.*[64] The person has a right to counsel, and to the appointment of counsel if he is financially unable to secure adequate representation. He is to be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. As is currently provided with respect to information offered in bail determinations,[65] the presentation and consideration of information at a detention hearing need not conform to the rules of evidence applicable in criminal trials. Pending the completion of the hearing, the defendant may be detained.

Because of the importance of the interests of the defendant which are implicated in a pretrial detention hearing, the Committee has specifically provided that the facts on which the judicial officer bases a finding that no form of conditional release is adequate reasonably to assure the safety of any other person and the community, must be supported by clear and convincing evidence. This provision emphasizes the requirement that there be an evidentiary basis for the facts that lead the judicial officer to conclude that a pretrial detention is necessary. Thus, for example, if the criminal history of the defendant is one of the factors to be relied upon, clear evidence such as records of arrest and conviction should be presented. (The committee does not intend, however, that the pretrial detention hearing be used as a vehicle to reexamine the validity of past convictions.) Similarly, if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense, such as possession or use of a weapon or threats to a witness, that tend to indicate that the defendant will pose a danger to the safety of the community if released.

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[62] D.C. Code, sec. 23-1322(c)(3).

[63] D.C. Code, secs. 23-1322(c)(4) and 23-1322(c)(5). One element of the District of Columbia Code provision not carried forward in section 3142(f) is its 60-day limitation on the detention period which is set out in section 23-1322(d)(2)(A) of the District of Columbia Code, 18 U.S.C. 3161, specifically requires that priority be given to a case in which a defendant is detained, and also requires that his trial must, in any event, occur within 90 days, subject to certain periods of excludable delay, such as for mental competency tests. These current limitations are sufficient to assure that a person is not detained pending trial for an extended period of time.

[64] *Supra* note 23 at 1333-1341.

[65] 18 U.S.C. 3146(f). It is the intent of the Committee to retain current law so that any information presented or considered in any of the release or detention proceedings under this chapter need not conform to the rules of evidence applicable in criminal trials.

Subsection (g) enumerates the factors that are to be considered by the judicial officer in determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of any other person and the community. Since this determination is to be made whenever a person is to be released or detained under this chapter, consideration of these factors is required not only in proceedings concerning the pretrial release or detention of the defendant under section 3142, but also where release is sought after conviction under section 3143, where a determination to release or detain a material witness under section 3144 is to be made, or where a revocation hearing is held under section 3148(b).

Most of the factors set out in subsection (g) are drawn from the existing Bail Reform Act and include such matters as the nature and circumstances of the offense charged, the weight of the evidence against the accused, and the history and characteristics of the accused, including his character, physical and mental condition, family ties, employment, length of residence in the community, community ties, criminal history,[66] and record concerning appearance at court proceedings.[67] The Committee has decided to expand upon this list and to indicate to a court other factors that it should consider. These additional factors for the most part go to the issue of community safety, an issue which may not be considered in the pretrial release decision under the Bail Reform Act. The added factors include not only a general consideration of the nature and seriousness of the danger posed by the person's release but also the more specific factors of whether the offense charged is a crime of violence or involves a narcotic drug, whether the defendant has a history of drug or alcohol abuse, and whether he was on pretrial release, probation, parole, or another form of conditional release at the time of the instant offense.[68]

Subsection (g) also contains a new provision designed to address a problem that has arisen in using financial conditions of release to assure appearance. The rationale for the use of financial conditions of release is that the prospect of forfeiture of the amount of a bond or of property used as collateral to secure release is sufficient to deter flight. However, when the proceeds of crime are used to post bond, this rationale no longer holds true. In recent years, there has been an increasing incidence of defendants, particularly those engaged in highly lucrative criminal activities such as drug trafficking, who are able to make extraordinarily high money bonds, posting bail and then fleeing the country. Among such defendants, forfeiture of bond is simply a cost of doing business, and it appears that there is a growing practice of reserving a portion of crime income to cover this cost of avoiding prosecution.[69]

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[66] Under current law, consideration of a defendant's criminal history is confined to his record of convictions. See 18 U.S.C. 3146(b). While a prior arrest should not be accorded the weight of a prior conviction, the Committee believes that it would be inappropriate to require the judge in the context of this kind of hearing to ignore a lenghty record of prior arrests, particularly if there were convictions for similar crimes. Similarly, it would be improper to prohibit consideration of prior arrests if there were also evidence that the failure to convict was due to the defendant's intimidation of witnesses. In any event, independent information concerning past criminal activities of a defendant certainly can, and should, be considered by a court.

[67] 18 U.SC. 3146(b). See *Wood* v. *United States*, 391 F.2d 981 (D.C. Cir. 1968); *United States* v. *Alston*, 420 F.2d 176 (D.C. Cir. 1969).

[68] The emphasis on drug-related factors and on prior criminal history is in accord with empirical research conducted in the District of Columbia which indicates a significant correlation between drug use and both failure to appear and pretrial rearrest, and between criminal history and pretrial rearrest. INSLAW study, *supra* note 15, at 57–59 and 61–65.

The source of property used to fulfill a condition of release is thus an important consideration in a judicial officer's determination of whether such a condition will assure the appearance of the defendant.[70] In recognition of this, the Committee has provided in subsection (g) that the judicial officer, in considering the conditions of release described in sections 3142(c)(2)(K) and 3142(c)(2)(L), may upon his own motion, or shall upon the motion of the government, conduct an inquiry concerning the source of property to be designated for potential forfeiture or to be offered as collateral to secure a bond. The reference to "collateral to secure a bond" refers not only to property of the defendant or a third party which is to be directly used to secure release, but also money or other property which may be pledged or paid to a surety in order to secure his execution of a bond. The judicial officer must decline to accept the designation or use of property that, because of its source, would not reasonably assure the appearance of the defendant.[71]

Such inquiries into the source of property used to secure release are currently used to some extent, and are commonly referred to as *Nebbia* hearings.[72] However, because of a lack of clear statutory authority to conduct such hearings, particularly with respect to corporate sureties,[73] many courts have refused government requests for any inquiry into the source of property used to post bond. Therefore, the Committee has, in subsection (g), provided for this statutory authority so that judicial officers may make informed decisions as to whether financial conditions of release will be sufficient to assure appearance of defendants.

The Committee also notes, with respect to the factor of community ties, that it is aware of the growing evidence that the presence of this factor does not necessarily reflect a likelihood of appearance,[74] and has no correlation with the question of the safety of the community. While the Committee considered deleting the factor altogether, it has decided to retain it at this time. However, the Committee wishes to make it clear that it does not intend that a court conclude there is no risk of flight on the basis of community ties alone; instead, a court is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community.

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[69] Bail Reform Hearings, *supra* note 4 at 181-182, 186-187 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[70] The Committee notes that the authority to consider danger to the community, and the presumption that drug traffickers should be detained, alleviates the problem addressed here to some extent, since many major drug traffickers would simply be held without bond under the bill.

[71] The judicial officers may also decline accepting the property if the defendant refuses to explain its source. See *United States* v. *DeMorchena*, 330 F. Supp. 1222 (S.D. Cal. 1970), in which the court refused to accept a $50,000 surety bond secured by $55,000 delivered in cash to the bondsman until the defendant presented evidence as to the source of the money.

[72] *United States* v. *Nebbia*, 357 F.2d 303 (2d Cir. 1966).

[73] Rule 46(d) of the Federal Rules of Criminal Procedure provides that every surety, except an approved corporate surety, may be required to file an affidavit listing the property used to secure the bond. This provision may implicitly authorize a hearing to inquire into the source of the property. The Rule's exemption of approved corporate sureties from this requirement raises a question whether similar inquiries can be made in the case of corporate sureties. At least two courts, however, have conducted such an inquiry. See *United States* v. *Melville*, 309 F. Supp. 824 (S.D., N.Y. 1970); *United States* v. *DeMorchena*, *supra* note 71.

[74] INSLAW study, *supra* note 15, at 54, 58.

Subsection (h) provides that in issuing an order of release under subsection (b) or (c), the judicial officer is to include a written statement setting forth all the conditions of release in a clear and specific manner. He is also required to advise the person of the penalties applicable to a violation of the conditions and that a warrant for his arrest will be issued immediately upon such violation. A similar provision exists in current law.[75] However, failure to render such advice is not a bar or defense to prosecution for bail jumping under section 3146, as amended by this title. This principle is in keeping with the intent of Congress in enacting the Bail Reform Act and the judicial interpretation of the Act.[76] The purpose of such advice is solely to impress upon the person the seriousness of failing to appear when required; such warnings were never intended to be a prerequisite to a bail jumping prosecution. Subsection (h) also requires the court to advise a defendant being released of the provisions of 18 U.S.C. 1503, 1510, 1512, and 1513 dealing with penalties for tampering with a witness, victim, or informant. This is intended to impress on the defendant the seriousness of such conduct. The issuance of such a warning is not a prerequisite to a prosecution under these sections of title 18 designed to protect witnesses, victims, and informants.

Subsection (i) requires the court, in issuing an order of detention to include written findings of fact and a written statement or reference to the hearing record specifying reasons for the detention. It also requires the court to direct that the person detained be confined, to the extent practicable, separately from persons awaiting sentence, serving a sentence, or being held in custody pending appeal;[77] that the person be afforded reasonable opportunity to consult with counsel; and that, upon proper authority, the custodian of the person transfer him to the United States Marshal for appearance in connection with court proceedings. The court may also permit, by subsequent order, the temporary release of the person detained to the extent necessary for preparation of his defense or for other compelling reasons.[78]

Subsection (j) states that nothing in this section shall be construed as modifying or limiting the presumption of innocence. The rule of evidence known as the presumption of innocence has been found by the Supreme Court to have "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[79] Thus, this provision states what the Committee understands to be the correct relationship of the presumption of innocence to pretrial release and detention authority.

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[75] 18 U.S.C. 3146(c).

[76] See *United States* v. *Cardillo*, 473 F. 2d 325 (4th Cir. 1973); *United States* v. *DePugh*, 434 F. 2d 548 (18th Cir. 1970), cert. denied, 401 U.S. 978 (1971); *United States* v. *Eskew*, 469 F. 2d 278 (9th Cir. 1972).

[77] Whether a separation of the detained person from persons already convicted will be practicable is to be gauged in light of existing facilities. The Committee emphasizes that this provision is not intended to be used to require the construction of new detention facilities or renovation of existing facilities.

[78] The counterpart of subsection (i) appears at D.C. Code secs. 23-1321(h) and 23-1322(c).

[79] *Bell* v. *Wolfish*, *supra* note 5, 441 U.S. at 533; see discussion of the presumption of innocence in S. Rept. No. 98-147, *supra* note 2 at 13-18.

SECTION 3143. RELEASE OR DETENTION OF A DEFENDANT PENDING SENTENCE OR APPEAL

This section makes several revisions in that portion of current 18 U.S.C. 3148 which concerns post-conviction release. Although there is clearly no constitutional right to bail once a person has been convicted,[80] 18 U.S.C. 3148, as well as this section, statutorily permit release of a person while he is awaiting sentence or while he is appealing or filing for a writ of certiorari. The basic distinction between the existing provision and section 3143 is one of presumption. Under current 18 U.S.C. 3148 the judicial officer is instructed to treat a person who has already been convicted according to the release standards of 18 U.S.C. 3146 that apply to a person who has not been convicted, unless he has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. It has been held that although denial of bail after conviction is frequently justified, the current statute incorporates a presumption in favor of bail even after conviction.[81] It is the presumption that the Committee wishes to eliminate in section 3143.

In doing so, the Committee has largely based section 3143 on a similar provision enacted in 1971 in the District of Columbia Code.[82] Once guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.

Second, release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years. Section 3143, therefore, separately treats release pending sentence, release pending appeal by the defendant, and release pending appeal by the government.

As to release pending sentence, subsection (a) provides that a person convicted shall be held in official detention unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or to pose a danger to the safety of any other person or the community.

Subsection (a) also covers those awaiting the execution of sentence as well as its imposition. This is to make it clear that a person may be released in appropriate circumstances for short periods of time after sentence, when there is no appeal pending, for such matters as getting his affairs in order prior to surrendering for service of sentence. By authorizing release in such circumstances under section 3143, the subsection establishes that absconding after imposition of sentence, but prior to its execution, is a violation of the bail jumping statute [83] which applies to release pursuant to this section as well as section 3142.

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[80] *United States* v. *Baca*, 444 F.2d 1292, 1296 (10th Cir.), cert. denied, 404 U.S. 979 (1971).

[81] *United States* v. *Bynum*, 344 F. Supp. 647 (S.D.N.Y. 1972).

[82] D.C. Code sec. 23-1325.

[83] 18 U.S.C. 3146, as amended by the bill.

Subsection (b) deals with release after sentence of a defendant who has filed an appeal or a petition for a writ of certiorari. Such person is also to be detained unless the judicial officer finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community. In addition, the court must affirmatively find that the appeal is not taken for the purpose of delay and that it raises a substantial question of law or fact likely to result in reversal or an order for a new trial. This is a further restriction on post conviction release. Under the current 18 U.S.C. 3148, release can be denied if it appears that the appeal is frivolous or taken for delay. The change in subsection (b) requires an affirmative finding that the chance for reversal is substantial. This gives recognition to the basic principle that a conviction is presumed to be correct.

Under both subsections (a) and (b), if the presumption in favor of detention can be overcome, the defendant is to be treated pursuant to the provisions of section 3142(b) or (c).

The Committee intends that in overcoming the presumption in favor of detention the burden of proof rests with the defendant. Under Rule 9(c) of the Federal Rules of Appellate Procedure the burden of proving that the defendant will not flee or pose a danger to any other person or to the community rests on the defendant.[84] This has been questioned as not reflecting the proper release presumption of the Bail Reform Act.[85]

Whether that is correct or not, the burden under this subsection is on the defendant to establish not only that he will not flee or pose a danger to the safety of any other person or the community, but also that his appeal under subsection (b) is not taken for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.[86]

Subsection (c) concerns release pending appeal by the government from orders of dismissal of an indictment or information and suppression of evidence pursuant to 18 U.S.C. 3731. As both of these kinds of appeals contemplate a situation in which the defendant has not been convicted, the defendant is to be treated under section 3142, the general provision governing release or detention pending trial. Subsection (c) is a new provision derived from 18 U.S.C. 3731. Use of the term "treated" removes an ambiguity in the current statute and makes it clear that the judicial officer may release or detain the defendant as provided in section 3142.[87] In such cases, the defendant, of course, would not have been convicted, and he thus should be treated in the same manner as a person who has not yet stood trial, as opposed to a person who has been tried and convicted.

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[84] See also Rule 46(c) of the Federal Rules of Criminal Procedure.

[85] See *Bail Pending Appeal in Federal Court: The Need for a Two-Tiered Approach*, 57 Texas L. Rev. 275 (1979).

[86] The advisory notes to Rule 9(c) of the Federal Rules of Appellate Procedure state that the burden of showing that the appeal appears to be frivolous or taken for delay rests with the government. The Committee intends that under section 3143 the burden of showing the merit of the appeal should now rest with the defendant. Rule 9(c) is changed by section 109 of this title to conform to this section.

[87] *Cf. United States* v. *Herman*, 554 F.2d 791, 794-795 n. 5 (5th Cir. 1971) noting the ambiguity in current 18 U.S.C. 3731.

SECTION 3144. RELEASE OR DETENTION OF A MATERIAL WITNESS

This section carries forward, with two significant changes, current 18 U.S.C. 3149 which concerns the release of a material witness. If a person's testimony is material in any criminal proceeding,[88] and if it is shown that it may become impracticable to secure his presence by subpoena, the government is authorized to take such person into custody.[89] A judicial officer is to treat such a person in accordance with section 3142 and to impose those conditions of release that he finds to be reasonably necessary to assure the presence of the witness as required, or if no conditions of release will assure the appearance of the witness, order his detention as provided in section 3142. However, if a material witness cannot comply with the release conditions or there are no release conditions that will assure his appearance, but he will give a deposition that will adequately preserve his testimony, the judicial officer is required to order the witness' release after the taking of the deposition if this will not result in a failure of justice.

The first change in current law is that, in providing that a material witness is to be treated in accordance with section 3142, section 3144 would permit the judicial officer to order the detention of the witness if there were no conditions of release that would assure his appearance. Currently, 18 U.S.C. 3149 ambiguously requires the conditional release of the witness in the same manner as for a defendant awaiting trial, yet the language of the statute recognizes that certain witnesses will be detained because of an inability to meet the conditions of release imposed by the judicial officers. The Committee believes that judicial officers should have the authority to detain material witnesses as to whom no form of conditional release will assure their appearance, in the same manner as provided in section 3142 for defendants awaiting trial.[90] However, the Committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody.

The other change the Committee has made is to grant the judicial officer not only the authority to set release conditions for a detained material witness, or, in an appropriate case, to order his detention pending his appearance at the criminal proceeding, but to authorize the arrest of the witness in the first instance. It is anomolous that current law authorizes release conditions but at the same time does not authorize the initial arrest. In one case dealing with this problem, the Ninth Circuit found the power to arrest a material witness to be implied in the grant of authority to release him on conditions under 18 U.S.C. 3149.[91] In its research on the law, the court discovered that specific arrest authority existed in Federal law from 1790 to 1948. The court concluded that the dropping of the authority in the 1948 revision of Federal criminal laws was inadvertent. The Committee agrees with that conclusion and expressly approves the finding of the implied right to arrest in the authority granted to the judicial officer to release on conditions that is set forth in 18 U.S.C. 3149. To cure this ambiguity, the Committee has added to section 3144 (the successor to 18 U.S.C. 3149) specific language authorizing the judge to order the arrest of a material witness.

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[88] A grand jury investigation is a "criminal proceeding" within the meaning of this section. *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971).

[89] *Ibid.*

[90] Of course a material witness is not to be detained on the basis of dangerousness.

[91] *Bacon* v. *United States*, *supra* note 88; see also, *United States* v. *Anfield*, 539 F.2d 674, 677 (9th Cir. 1976).

SECTION 3145. REVIEW AND APPEAL OF A RELEASE OR DETENTION ORDER

Section 3145 sets forth the provisions for the review and appeal of release and detention orders. Subsections (a) and (b) provide for the review of release and detention orders by the court having original jurisdiction over the offense in situations in which the order is initially entered by a magistrate, or other court not having original jurisdiction over the offense (other than a Federal appellate court). The review of release orders is governed by subsection (a), which permits the defendant to file a motion for amendment of the conditions of his release and permits the government to file a motion for amendment of the release conditions or for revocation of the release order. Subsection (b) gives the defendant a right to seek review of a detention order analogous to his right to seek review of a release order under subsection (a)(2).

Subsection (c) grants both the defendant and the government a right to appeal release or detention orders, or decisions denying the revocation or amendment of such orders. Appeals under this section are to be governed by 28 U.S.C. 1291 in the case of an appeal by the defendant and by 18 U.S.C. 3731 in the case of an appeal by the government. Section 104 of this title amends 18 U.S.C. 3731 to provide specific authority for the government to appeal release decisions. Since both 28 U.S.C. 1291 and 18 U.S.C. 3731, as amended by the bill, provide only for appeals decisions or orders of a district court, if the release or detention order was not originally entered by a judge of a district court, review by the district court must first be sought under section 3145 (a) or (b) before an appeal may be filed under section 3145(c). This concept, not included in 18 U.S.C. 3148, promotes a more orderly and rational disposition of issues involving release determination. Like motions for review of detention or release orders under subsections (a) and (b), appeals under subsection (c) are to be determined promptly.[92]

Although based in part on the current 18 U.S.C. 3147, section 3145 makes two substantive changes in present law. First, section 3145 permits review of all releases and detention orders. Under 18 U.S.C. 3147, review is confined to those situations in which the defendant has been detained or has been ordered released subject to the condition that he return to custody after specified hours, and appeals to the courts of appeals are permitted only after the defendant has sought a change in the conditions from the trial court. Section 3145 would provide defendants with the opportunity to appeal the conditions of their release irrespective of whether they were in fact detained because of an inability to meet those conditions, and it would permit direct appeal to the court of appeals rather than requiring the defendant to go back to the trial court. Only if the conditions were imposed by a court other than the trial court would the defendant be required to seek a change in the conditions from the trial court before appealing to the court of appeals.

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[92] The procedures for such appeals, which are set forth in Rule 9 of the Federal Rules of Appellate Procedure, are designed, as stressed in the advisory notes, to facilitate speedy review if relief is to be effective.

The second, and more significant change, is that section 3145, in conjunction with the amendment to 18 U.S.C. 3731 would specifically authorize the government, as well as the defendant, to seek review and appeal of release decisions. The Bail Reform Act makes no provisions for review of decisions upon motion of the government, although this authority may be implicit in the Act.[93] The Department of Justice urged that the government be granted specific authority to seek review of release decisions to the same extent that such authority is given defendants, and the Committee agrees that, as a matter of both basic fairness and sound policy, the government, on behalf of the public, should have such an opportunity. There is a clear public interest in permitting review of release orders which may be insufficient to prevent a defendant from fleeing or committing further crimes.

SECTION 3146. PENALTY FOR FAILURE TO APPEAR

The purpose of section 3146 is to deter those who would obstruct law enforcement by failing knowingly to appear for trial or other judicial appearances and to punish those who indeed fail to appear. The section basically continues the current law offense of bail jumping.

The present bail jumping offense is 18 U.S.C. 3150 which was enacted in 1966 as part of the Bail Reform Act of 1966.[94] The Federal bail jumping statute was first enacted in 1954 to fill the void in the criminal law highlighted by the conduct of fleeing fugitives who were leaders of the Communist Party. The only available penalties, at that time, were forfeiture of money and contempt proceedings. In the absence of an indictable offense of bail jumping, defendants were able to buy their freedom by forfeiting their bonds and taking the risk that they could go unapprehended. Even if apprehended, many defendants could hide for periods long enough for the government's case, especially for major offenses, to grow weaker because of the unavailability of witnesses, memory lapses, and the like, and thereby defeat the government's prosecutive efforts. They would then be subject only to the criminal contempt charge, the sentence for which was usually of considerably less gravity than for the original offense. These were the reasons that led to the original Federal bail jumping statute of 1954. Those same reasons underlie current 18 U.S.C. 3150 and proposed section 3146 of this bill.

A violation of the current bail jumping statute requires, first, that a person, be released pursuant to the provisions of the Bail

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[93] See *United States* v. *Zuccaro, supra*, note 52, which held that the right of the government to seek reconsideration of a bail determination by the trial court is implicit in the Bail Reform Act. Since 18 U.S.C. 3147(b) permits appeal of release decisions only when the defendant has been detained, it is doubtful that the government has any right to appeal, as opposed to a right to seek reconsideration of, a release decision under the Act.

[94] 18 U.S.C. 3146 et seq.

Reform act,[95] and, second, that "he willfully fail * * * to appear before any court or judicial officer, as required." The word "willfully" as used in the statute has been interpreted to mean that the omission of failing to appear was "voluntary * * * and with the purpose of violating the law, and not by mistake, accident, or in good faith." [96] Furthermore, actual notice of the appearance date has been held unnecessary in the face of evidence of the defendant's willful failure to appear.[97] The requirement that the person fail to appear "before any court or judicial officer" has led at least one court to hold that it is not an offense under 18 U.S.C. 3150 to fail to surrender to a United States marshal to begin service of sentence as ordered.[98]

A violation of 18 U.S.C. 3150 carries a maximum term of five years in prison if the defendant was released in connection with a charge of felony, or if he was released while awaiting sentence, or pending appeal or petition for certiorari after conviction for any offense. If the defendant has been released on a charge of a misdemeanor or as a material witness, bail jumping carries a maximum penalty of one year in prison. The statute also calls for a forfeiture of any security given for his release. However, such a forfeiture is not a condition precedent to bringing a prosecution for bail jumping.[99]

Section 3146, as reported, basically continues the current law offense of bail jumping although the grading has been enhanced to more nearly parallel that of the underlying offense for which the defendant was released. This enhanced grading provision is designed to eliminate the temptation to a defendant to go into hiding until the government's case for a serious felony grows stale or until a witness becomes unavailable, often a problem with the passage of time in narcotics offenses, and then to surface at a later date with criminal liability limited to the less serious bail jumping offense. A specific provision has been added to make clear that the failure to surrender for service of sentence is covered as a form of bail jumping.

As noted, the basic offense set forth in section 3146 parallels current law. Subsection (a) provides that a person commits an offense if after having been released pursuant to the provisions of new chapter 207 of title 18, (1) he knowingly fails to appear before a court as required by the conditions of his release; or (2) he knowingly fails to surrender for service of sentence pursuant to a court order. This would include release of a material witness.

By use of the term "knowingly" as a mental state requirement, the Committee intends to perpetuate the concept of "willfully" which appears in the current bail jumping statute as interpreted in

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[95] This probably does not apply to an individual released on bail in connection with a charge of juvenile delinquency, since the Bail Reform Act speaks in terms of persons "charged with an offense". 18 U.S.C. 3146; see also 18 U.S.C. 3148, 5034.

[96] *United States* v. *Bourassa*, 411 F.2d 69, 74 (10th Cir.), cert. denied, 396 U.S. 915 (1969).

[97] *United States* v. *DePugh*, 434 F.2d 548 (8th Cir. 1970), cert. denied, 401 U.S. 978 (1971); *United States* v. *Bourassa*, *supra* note 96.

[98] *United States.* v. *Wray*, 369 F. Supp. 118 (W.D. Mo. 1970); but see *United States* v. *Bright*, 541 F.2d 471 (5th Cir. 1976), and *United States* v. *West*, 477 F.2d 1056 (4th Cir. 1973), reaching the opposite conclusion on the ground that the marshal is an agent of the court for these purposes.

[99] *United States* v. *DePugh*, *supra* note 97; *United States* v. *Bourassa*, *supra* note 97.

United States v. *DePugh*[100] and *United States* v. *Hall.*[101] Often a defendant realizes that he may have to appear but simply disappears, moves and fails to leave a forwarding address, fails to keep in touch with his attorney, or does not respond to notices and when later apprehended defends on the grounds that he was out of town on the designated appearance date, that he never received any notice, or the like. Under the standard contemplated by the Committee, the defendant could be convicted for bail jumping upon a showing that he was aware that an appearance date will be set and that there will be a resulting failure to appear. Conduct involving a failure to keep in contact and in touch with the situation amounts to a conscious disregard that an appearance date will come and pass. A person released on bail can be charged with a gross deviation from the standard of conduct applicable to the ordinary person when he fails to keep in touch with the status of his case or places himself out of reach of the authorities and his attorney.[102]

Subsection (c) provides that it is an affirmative defense that "uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist." It is intended that the defense should apply where, for example, a person is recuperating from a heart attack and to leave his bed would imperil his life, or, after he had made careful plans for transportation to the court house, his vehicle breaks down or unexpected weather conditions bring traffic to a halt. The requirement of appearance or surrender as soon as circumstances permit was included by the Committee for two reasons: first, in order to confirm the defendant's lack of bad faith in failing to appear or surrender; and, second, to encourage the defendant to appear or surrender even after he fails to so do as required. Since the defense is denominated as "affirmative," the defendant will bear the burden of proof as to the elements thereof by a preponderance of the evidence.

After requiring that the offender has been released pursuant to the provisions of this chapter, subsection (a)(1) goes on to require that the released person fail to appear before "a court as required by the conditions of his release." The word "court" is intended to include the presiding judicial officer, and is intended to include any person authorized pursuant to section 3141 and the Federal Rules of Criminal Procedure to grant bail or otherwise release a person charged with or convicted of a crime or who is a material witness.[103] It is not intended to cover such lesser court officials as probation officers, marshals, bail agency personnel, and the like. The holding in *United States* v. *Clark*[104] that a probation officer is not a judicial officer so that a failure to appear before him as required by the court is not bail jumping is specially endorsed, and section 3146 should be interpreted to reach the same results. Bail jumping is an offense intended to apply to actual court appearances before judges or magistrates and not to other court personnel, with the sole exception of a failure to surrender for service of sentence, as covered in subsection (a)(2). In this situation the Committee believes that the failure to appear is tantamount to a failure to appear before a court and is equally deserving of punishment.

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[100] *Supra* note 97.

[101] 346 F.2d 875 (2d Cir.), cert., denied, 382 U.S. 919 (1965).

[102] See *United States* v. *Bright, supra* note 98. Compare *Gant* v. *United States*, 506 F.2d 518 (8th Cir. 1974), cert. denied, 420 U.S. 1005 (1975).

[103] See 18 U.S.C. 3141.

[104] 412 F.2d 885 (5th Cir. 1969).

The term "as required" in subsection (a)(1) has been held not to be unconstitutionally vague when combined with a requirement of "willfully," [105] or "knowingly" in the case of this bill.

As indicated in connection with the discussion of the culpability standard, it is often the case that accused persons who by their own acts place themselves out of touch with the authorities defend on the basis that they never received actual notice of a scheduled appearance date and thus cannot be charged with a failure to appear "as required." Actual notice of an appearance date, however, is not an element of the offense under 18 U.S.C. 3150, the language of which is similar to that of proposed section 3146.[106] The burden on the government is only to see that reasonable efforts are made to serve notice on the defendant as to any mandatory court appearance. In *United States* v. *DePugh, supra,* the defendant had gone underground and had left no forwarding address with court officials or his attorney. Notice of the trial date was given to the defendant's wife at his last known address and to the defendant's attorney. Such notice was deemed sufficient to make the appearance "as required." It would also suffice under section 3146.

Current section 3146(c) of title 18 of the United States Code, provides that a judicial officer authorizing a release under the Bail Reform Act must issue an order that, inter alia, informs the released person of the penalties applicable for violation of the conditions of release. In *DePugh,* it was argued that issuance of such an order is a condition prerequisite to a bail jumping prosecution under 18 U.S.C. 3150. That contention was rejected. The court cited the legislative history of 18 U.S.C. 3150 to find that 18 U.S.C. 3146(c) is designed to enhance the deterrent value of criminal penalties but that it was not intended to establish the issuance of the order as prerequisite to subsequent prosecution. That history and the *DePugh* holding with respect to the effect of 18 U.S.C. 3146(c) are specifically endorsed.

As noted above, the grading for the new section 3146 has been designed to parallel the penalty for the offense for which the defendant has been released. Under current 18 U.S.C. 3150, the penalties for bail jumping are a $5,000 fine and five years of imprisonment, where the defendant was released in connection with a felony charge, and a fine of $1,000 and one year of imprisonment, where the defendant was released in connection with a misdemeanor or in the case of a failure to appear as a material witness. The Department of Justice strongly urged that the penalties for bail jumping be amended to more closely parallel the penalties for the offense in connection with which the defendant was released.[107] The Committee endorses his suggestion as a means of enhancing the effectiveness of the bail jumping offense as a deterrent to flight. Thus, the penalties for bail jumping set out in proposed section 3146, are to be (1) up to a $25,000 fine and ten years' imprisonment where the offense was punishable by death, life imprisonment, or up to fifteen years of imprisonment; (2) up to a $10,000 fine or imprisonment for 5 years, where the offense was punishable by more than five, but less than fifteen years of imprisonment; (3) a fine of not more than $5,000 and imprisonment for not more than two years, if the offense was any other felony; and (4) a fine of not more than $2,000 and imprisonment for not more than one year, if the offense was a misdemeanor. The current penalties for failure to appear as a material witness, i.e., not more than a $1,000 fine and imprisonment for one year are retained in section 3146(b)(2).

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[105] See *United States* v. *DePugh, supra* note 97.

[106] *Ibid.; United States* v. *Bourassa, supra* note 97.

[107] Bail Reform Hearings, *supra* note 4 at 185 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

Subsection (d) of section 3146, simply emphasizes that in addition to the penalties of fine and imprisonment provided for bail jumping, the court may also order the person to forfeit any bond or other property he has pledged to secure his release if he has failed to appear. This subsection also makes it clear that such forfeiture may be ordered irrespective of whether the person has been charged with the offense of bail jumping under section 3146.

SECTION 3147. PENALTY FOR AN OFFENSE COMMITTED WHILE ON RELEASE

Section 3147 is designed to deter those who would pose a risk to community safety by committing another offense when released under the provisions of this title and to punish those who indeed are convicted of another offense. This section enforces the self-evident requirement that any release ordered by the courts include a condition that the defendant not commit another crime while on release. Given the problem of crime committed by those on pretrial release this requirement needs enforcement. Accordingly, this section prescribes a penalty in addition to any sentence ordered for the offense for which the defendant was on release. This additional penalty is a term of imprisonment of at least two years and not more than ten if the offense committed while on release is a felony. If the offense committed while on release is a misdemeanor, this additional penalty is at least 90 days and not more than one year.

SECTION 3148. SANCTIONS FOR VIOLATIONS OF RELEASE CONDITIONS

Section 3148 provides in subsection (a) for two distinct sanctions that are applicable for persons released pursuant to section 3142 [108] who violate a condition of their release—revocation of release and an order of detention, and a prosecution for contempt of court. One of the criticisms of the Bail Reform Act has been its failure to provide adequate sanctions for violation of release conditions; section 3148 provides such sanctions.

Subsection (b) sets out the procedure for revocation of release. Specific provisions for revocation of release are new to Federal bail law, although a similar provision exists in the District of Columbia Code.[109] The Committee has received testimony recommending such a provision,[110] and has adopted the concept.[111] Revocation is based upon a betrayal of trust by the person released by the court on conditions that were to assure both his appearance and the safety of the community. It should be noted that, as all persons are released under the mandatory condition under sections 3142(b) and 3142(c)(1) that they not commit a Federal, State, or local crime during the period of release, establishment of probable cause that a crime has been committed while a person was released is sufficient to trigger the revocation procedure of section 3148, as is a violation of any of the discretionary release conditions set for the defendant pursuant to section 3142(c)(2).

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[108] All releases under the provisions of this bill, whether pretrial or pending sentence or appeal, are technically pursuant to section 3142. Thus the sanctions are applicable to all releases pursuant to this subsection.

The attorney for the government can initiate the revocation proceeding by filing a motion to that effect with the court. A judicial officer may then issue an arrest warrant and have the person brought before the court in the district in which his arrest was ordered for a revocation hearing. An order of revocation and detention will issue at this hearing if the court finds, first, that there is either probable cause to believe that the person has committed a Federal, State, or local crime while on release or clear and convincing evidence that the person has violated any other condition of his release; and, second, that either no condition or combination of conditions can be set that will assure that the person will not flee or pose a danger to the safety of any other person or the community or the person will not abide by reasonable conditions. This latter provision is intended to reach the situation in which a defendant continuously flouts the court by disobeying conditions such as restrictions on his association or travel, and in which it is clear that he will continue to do so. If the court finds that there are conditions that will assure both appearance and safety and that the person will abide by such conditions, he is to be released pursuant to section 3142 on appropriate conditions, which may be an amended version of the earlier conditions.

In testimony before the Committee, the Department of Justice recommended that revocation of release be required if the person committed another serious crime while on release.[112] The commission of a serious crime by a released person is plainly indicative of his inability to conform to one of the most basic conditions of his release, i.e. that he abide by the law, and of the danger he poses to other persons and the community, factors which section 3148 recognizes are appropriate bases for the revocation of release. Nonetheless, there may be cases in which a defendant may be able to demonstrate that, although there is probable cause to believe that he has committed a serious crime while on release, the nature or circumstances of the crime are such that revocation of release is not appropriate. Thus, while the Committee is of the view that commission of a felony during the period of release generally should result in the revocation of the person's release, it concluded that the defendant should not be foreclosed from the opportunity to present to the court evidence indicating that this sanction is not merited. However, the establishment of probable cause to believe that the defendant has committed a serious crime while on release constitutes compelling evidence that the defendant poses a danger to the community, and, once such probable cause is established, it is appropriate that the burden rest on the defendant to come forward with evidence indicating that this conclusion is not warranted in his case. Therefore, the Committee has provided in section 3148(b) that if there is probable cause to believe that the person has committed a Federal, State, or local felony while on release, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community.

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[109] D.C. Code, sec. 23-1329.

[110] Criminal Code Hearings, part XIV, p. 10323 (testimony by Professor Alan Dershowitz).

[111] Specific provision for revocation is also recommended by the ABA 1978 Standards, *supra* note 8, Standard 10-5.7 and by the Uniform Rules of Criminal Procedure, *supra* note 9, Rule 341(e).

[112] Bail Reform Hearing, *supra* note 4 at 179 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

Subsection (c) emphasizes that the court may impose contempt sanctions if the person has violated a condition of his release. This carries forward the provisions of existing 18 U.S.C. 3151.

SECTION 3149. SURRENDER OF AN OFFENDER BY A SURETY

Except for minor word changes, this provision is identical to 18 U.S.C. 3142. The section provides that in cases where a person is released on an appearance bond with a surety, such person may be arrested by his surety and delivered to a United States Marshal and brought before the court. The person so returned will be retained in custody until released pursuant to this chapter or under other provisions of law. The language is amended to delete as outmoded the authority of the surety to request detention of the defendant, and to substitute a requirement that the judge determine whether to revoke release in accord with section 3148.

SECTION 3150. APPLICABILITY TO A CASE REMOVED FROM A STATE COURT

This section specifies that the release provisions of new chapter 207 of title 18, United States Code, are to apply to a case removed to a Federal court from a State court. Current 18 U.S.C. 3144, relating to detention of a State prisoner whose case is before the United States Supreme Court, is deleted. It is expected that decisions on release in such cases will ordinarily be made by the State courts under State law.

TITLE II—SENTENCING REFORM

GENERAL STATEMENT

Title II of S. 1762 and S. 668, a separate bill identical in language except for technical changes also reported to the Senate on August 4, 1983, represent the first comprehensive sentencing law for the Federal system. They are the culmination of a reform effort begun more than a decade ago by the National Commission on Reform of Federal Criminal Laws [1] and championed in recent years by former United States district judges Marvin E. Frankel and Harold R. Tyler, Dean Norval Morris of the University of Chicago Law School, Professor Alan Dershowitz of Harvard Law School, and numerous others, including Senators John L. McClellan, Roman L. Hruska, Edward M. Kennedy, Strom Thurmond, and Joseph Biden. After extensive hearings on the National Commission's Final Report and other proposals, which resulted in further refinement of the proposals, comprehensive sentencing reform provisions were included in S. 1437, as reported in the 95th Congress by this Committee (S. Rept. No. 95-605) and overwhelmingly passed by the Senate on January 30, 1978. These comprehensive sentencing provisions were carried forward in S. 1722 (S. Rept. No. 96-553) in the 96th Congress and in S. 1630 (S. Rept. No. 97-307) in the 97th Congress, both of which were reported with nearly unanimous votes by the Committee, with further refinements resulting from additional research and suggestions received by the Committee since S. 1437 was passed. The proposals received the strong endorsement of the Attorney General's Task Force on Violent Crime [2] and were included in S. 2572 as passed by the Senate on September 30, 1982, by a vote of 95 to 1, and added to H.R. 3963.

On March 3, 1983, Senator Kennedy introduced S. 668—the "Sentencing Reform Act of 1983." [3] On March 16, 1983, Senators Thurmond and Laxalt introduced S. 829 on behalf of the Administration, a sixteen-title bill that proposed in title II substantially identical sentencing provisions to those in S. 668. Five days of hearings by the Subcommittee on Criminal Law were held on a number of crime proposals, including S. 668 and S. 829.[4] One of the days, chaired by Senator Kennedy, focused exclusively on sentencing reform and the reaction of victims of violent crime to sentences imposed under current practices.

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[1] National Commission on Reform of Federal Criminal Laws, Final Report (1971), reprinted in Subcommittee Criminal Code Hearings, Part I, at 129-514 (hereinafter cited as National Commission Final Report).

[2] See Attorney General's Task Force on Violent Crime, Final Report 56-57 (1981) (hereinafter cited as Task Force Final Report).

[3] Senator Kennedy was joined as original cosponsors on S. 668 by Senators Thurmond, Biden, Laxalt, Baucus, DeConcini, Hatch, Leahy, Metzenbaum, Simpson, Specter, Abdnor, Hawkins, Cohen, D'Amato, Chiles, Glenn, Huddleston, Lugar, Stevens, Zorinsky, Moynihan, and Sasser.

[4] Crime Control Act Hearings.

Attorney General William French Smith in his first appearance before the Senate Committee on the Judiciary concerning major crime legislation noted the importance of, and committed the support of the current Administration to, major sentencing reform:[5]

> Of the improvements [under consideration by the Committee] * * * perhaps the most important are those related to sentencing criminal offenders. These provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing.

In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely.[6]

These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts and parole boards might look.[7] These problems are compounded by the fact that the sentencing judges and parole officials are constantly second-guessing each other, and, as a result, prisoners and the public are seldom certain about the real sentence a defendant will serve.

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[5] Criminal Code Hearings, Part XVI, at 11765.

[6] Such disparate release dates are the result of the wide discretion granted to sentencing judges and the United States Parole Commission under current Federal law. See 18 U.S.C. 4203 (powers and duties of the Commission); 18 U.S.C. 4206 (parole determination criteria: prisoner may be released by the Commission "upon consideration of the offense and the history and characteristics of the prisoner * * * and pursuant to guidelines promulgated by the Commission * * *. [The] Commission may [also] grant or deny release on parole notwithstanding [These] guidelines * * * if it determines there is good cause for so doing * * *"); 18 U.S.C. 4207 (allowing the Parole Commission to consider reports from any and all sources).

[7] Review of sentences imposed by the courts is confined to two special sentencing statutes (18 U.S.C. 3576, relating to dangerous special offenders, and 21 U.S.C. 849, relating to dangerous special drug offenders) unless the sentence is illegal. Review of decisions of the Parole Commission is generally confined to the question of whether it has abused its discretion.

In order to alleviate these problems, the Committee set several goals that it believes any sentencing reform legislation should meet.

First, sentencing legislation should contain a comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served by the sentencing system and a clear statement of the kinds and lengths of sentences available for Federal offenders.

Second, it should assure that sentences are fair both to the offender and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all Federal criminal cases.

Third, it should assure that the offender, the Federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it.

Fourth, it should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case.

Fifth, it should assure that each stage of the sentencing and corrections process, from the imposition of sentence by the judge, and as long as the offender remains within the criminal justice system, is geared toward the same goals for the offender and for society.

Unfortunately, current Federal law fails to achieve any of these goals. Each participant in the process, from the courts through the probation and parole systems, does the best it can with the legislative tools at hand, but none is able to reach these goals without substantial sentencing reform legislation.

Following is a brief description of current sentencing law and the attempts of the Federal criminal justice system to ameliorate the problems caused by that law. That description is followed by a summary of the sentencing reform proposals in the bill, as reported, and a discussion of how those proposals will achieve the goals set by the Committee. More detailed descriptions of current law and the sentencing provisions are contained in the section-by-section analysis.

CURRENT FEDERAL SENTENCING LAW

1. Lack of comprehensiveness and consistency

Current Federal law contains no general sentencing provision. Instead, current law specifies the maximum term of imprisonment and the maximum fine for each Federal offense in the section that describes the offense.[8] These maximums are usually prescribed with little regard for the relative seriousness of the offense as compared to similar offenses.[9]

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[8] For most offenses, the judge may suspend execution or imposition of the sentence and place the convicted offender on probation, or impose a split sentence of up to six months in prison followed by probation. See 18 U.S.C. 3651.

[9] For example, there are approximately 130 theft offenses under current law, with maximum sentences ranging from no imprisonment and a $500 fine, 18 U.S.C. 288, to ten years of imprisonment and a $10,000 fine, 18 U.S.C. 641. While the theft statutes occasionally vary the penalty according to the amount that is stolen, e.g., 18 U.S.C. 288, there is little difference among of-

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Current law also contains several specialized sentencing statutes that are each applicable to narrow classes of offenders—offenders between the ages of 18 and 22,[10] offenders between 22 and 26,[11] nonviolent offenders who are drug addicts,[12] offenders who are "dangerous special offenders," [13] and offenders who are "dangerous special drug offenders." [14] Other categories of offenders that might just as logically be covered by specialized statutes are left undifferentiated.

The sentencing provisions of current law were originally based on a rehabilitation model in which the sentencing judge was expected to sentence a defendant to a fairly long term of imprisonment. The defendant was eligible for release on parole after serving one-third of his term. The Parole Commission was charged with setting his release date if it concluded that he was sufficiently rehabilitated.[15] At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of "coercive" rehabilitation—the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons.

Recent studies suggest that this approach has failed,[16] and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions.[17] We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated. Until the present sentencing statutes are changed, however, judges and the Parole Commission are left to exercise their discretion to carry out what each believes to be the purposes of sentencing.

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fenses that would justify differences in sentences. Embezzlement is an excellent illustration. The maximum penalty for embezzling manpower funds is a $10,000 fine and two years of imprisonment if the amount embezzled is more than $100; if the amount embezzled is not more than $100, the maximum penalty is a $1,000 fine and one year of imprisonment, 18 U.S.C. 665(a). If a bankruptcy trustee embezzles any amount of money from a bankrupt estate, the maximum penalty is a $5,000 fine and five years of imprisonment, 18 U.S.C. 153. If a person entrusted with public funds embezzles them, the maximum penalty, if the amount embezzled is more than $100, is a fine of the amount embezzled and ten years of imprisonment; if the amount embezzled is $100 or less, the maximum penalty is a $1,000 fine and one year of imprisonment, 18 U.S.C. 648.

[10] 18 U.S.C. 5005 *et seq.*

[11] 18 U.S.C. 4216.

[12] 18 U.S.C. 4251 *et seq.*

[13] 18 U.S.C. 3575 *et seq.*

[14] 21 U.S.C. 849.

[15] See 45 Cong. Rec. 6374 (1910) (remarks of Rep. Clayton).

[16] Several published analyses of correctional treatment and programs illustrate their ineffectiveness. See Robinson & Smith, *The Effectiveness of Correctional Programs*, 17 Crime and Delinquency 67 (1971); Martinson, *What Works: Questions and Answers about Prison Reform*, 1947 Pub. Int. 22; D. Lipton, R. Martinson & J. Wilks, *Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975). See also D. Greenburg, *Much Ado about Little: The Correctional Effects of Corrections* (June, 1974) (unpublished summary of effectiveness studies prepared for the Committee for the Study of Incarceration); also discussed in A. Von Hirsch, *Doing Justice: The Choice of Punishments*, 14–15 (1976), which concludes that "the rehabilitative disposition is plainly untenable." *Id.* at 18.

[17] The Parole Commission does provide a small amount of advancement in the presumptive release date for "documented sustained superior program achievement over a period of 9 months or more in custody," and permits partial advancement even if there have been minor disciplinary infractions (28 C.F.R. § 2.60 (1982)).

2. Disparity and uncertainty in current Federal sentencing

a. Practices of the Federal judiciary

The absence of a comprehensive Federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants.[18] This occurs in sentences handed down by judges in the same district and by judges from different districts and circuits in the Federal system.[19] One judge may impose a relatively long prison term to rehabilitate or incapacitate the offender. Another judge, under similar circumstances, may sentence the defendant to a shorter prison term simply to punish him, or the judge may opt for the imposition of a term of probation in order to rehabilitate him.[20]

For example, in 1974, the average Federal sentence for bank robbery was eleven years, but in the Northern District of Illinois it was only five and one-half years. Similar discrepancies in Federal sentences for a number of different offenses were found in a landmark study by the United States Attorney's Office for the Southern District of New York.[21] Further probative evidence may be derived from another 1974 study in which fifty Federal district court judges from the Second Circuit were given twenty identical files drawn from actual cases and were asked to indicate what sentence they would impose on each defendant.[22] The variations in the judges' proposed sentences in each case were astounding, as shown in the following chart:

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[18] A recent study indicates that Federal judges disagree considerably about the purposes of sentencing. While one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than "slightly" important; conversely, about 25 percent thought "just deserts" was a very important or extremely important purpose of sentencing, while 45 percent thought it was only slightly important or not important at all. INSLAW, Inc., and Yankelovich, Skelly, and White, *Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions*, III-4 (1981) (hereinafter cited as Federal Sentencing Study).

[19] See *id.* at III-19 to III-21.

[20] *Id.* at III-9 to III-14.

[21] Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, reprinted in 119 Cong. Rec. 6060 (1973). For example, "[t]he range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit," *Id.* at 167.

[22] Partridge and Eldridge, *The Second Circuit Sentencing Study, A Report to the Judges* 1-3 (1974). Designed as a self-evaluation, the study involved 43 active judges and seven of the senior judges of the six judicial districts constituting the Second Circuit. To avoid the customary complications introduced by differences in cases, and to insure a focus upon differences in judges' sentencing behavior, the study asked these 50 judges to impose sentence on 20 different defendants charged with those Federal offenses most representative of the Circuit's workload. The judges were given the same representative presentence report prepared for each hypothetical offender. The total number of sentences—901—roughly approximated the number of sentences these judges would normally render in a 6 month period.

2D CIRCUIT SENTENCING STUDY

[20 cases]

	Most severe sentence	6th most severe sentence	12th most severe sentence	Median sentence
Case 1: Extortionate credit transactions; income tax violations.	20 yr pris.; $65,000	15 yr pris.; $50,000	15 yr pris	10 yr pris.; $50,000.
Case 2: Bank robbery	18 yr pris.; $5,000	15 yr pris	15 yr pris. [(a)(2)]	10 yr pris.
Case 3: Sale of heroin	10 yr pris.; 5 yr prob	6 yr pris.; 5 yr prob	5 yr pris.; 5 yr prob. [(a)(2)]	5 yr pris.; 3 yr prob.
Case 4: Theft and possession of stolen goods	7.5 yr pris	5 yr pris	4 yr pris	3 yr pris.
Case 5: Possession of barbiturates with intent to sell	5 yr pris.; 3 yr prob	3 yr pris.; 3 yr prob	3 yr pris.; 3 yr prob	2 yr pris.; 3 yr prob.
Case 6: Filing false income tax returns	3 yr pris.; $5,000	3 yr pris.; $5,000	2 yr pris.; $5,000	1 yr pris.; $5,000
Case 7: Possession of heroin	2 yr pris	2 yr pris	1.5 yr pris	[illegible]
Case 8: Mail fraud	YCA indet	YCA indet	6 mo pris.; 5 yr prob. [§ 4209]	[illegible] 5 yr prob. [§ 4209].
Case 9: Eluding examination and inspection by immigration officers; illegal entry after deportation.	3 yr pris	6 mo pris.; 2 yr unsup. prob	6 mo pris	[illegible] mo unsup. prob.
Case 10: Postal embezzlement	1 yr pris	6 mo pris.; 1 yr prob	3 mo pris.; 27 mo prob	[illegible]
Case 11: Bribery	6 mo pris.; 6 mo prob.; $5,000.	6 mo pris.; $2,500	2 mo pris.; 22 mo prob.; $5,000	[illegible] mo prob.; $5,000.
Case 12: Possession of unregistered firearm	1 yr pris	6 mo pris.; 3 yr prob	3 mo pris.; 21 mo prob	[illegible]
Case 13: Possession of counterfeit currency	1.5 yr pris	6 mo pris.; 2 yr prob	6 mo pris.; 18 mo prob	[illegible]
Case 14: Altering a forged U.S. Treasury check	YCA indet	YCA indet	1 yr pris	[illegible]
Case 15: Operating an illegal gambling business	1 yr pris.; $3,000	6 mo pris.; 3 yr prob.; $10,000	3 mo pris.; 2 yr prob.; $5,000	[illegible]
Case 16: Bank embezzlement	YCA indet	5 yr prob	3 yr prob	[illegible]
Case 17: Interstate transportation of stolen securities	3 yr pris	6 mo pris.; 4.5 yr prob	6 mo pris	[illegible]
Case 18: Mail theft	6 mo pris.; 18 mo prob	5 yr prob	3 yr prob.; $100	[illegible]
Case 19: Conspiracy to commit securities fraud	2 yr pris.; $2,500	6 mo pris.; 2 yr prob	3 mo pris.; 33 mo prob.; $7,500	[illegible]
Case 20: Perjury	1 yr pris.; $1,000	3 mo pris.; $1,000	3 yr prob.; $1,000	[illegible]

2D CIRCUIT SENTENCING STUDY

[20 cases]

	12th least severe sentence	6th least severe sentence	[illegible]	Sentences ranked
Case 1: Extortionate credit transactions; income tax violations	8 yr pris.; $20,000	5 yr pris.; 3 yr prob.; $10,000	1 yr pris.	45
Case 2: Bank robbery	7.5 yr pris.; [(a)(2)]	5 yr pris.	5 yr pris.	48
Case 3: Sale of heroin	3 yr pris.; 3 yr prob.	3 yr pris.; 3 yr prob.	1 yr pris.; 5 yr prob.	46
Case 4: Theft and possession of stolen goods	3 yr pris.	2 yr pris.	4 yr prob.	45
Case 5: Possession of barbiturates with intent to sell	1.5 yr pris.; 3 yr prob.	5 yr prob.; $500	2 yr prob.	42
Case 6: Filing false income tax returns	6 mo pris.; 2.5 yr prob; $3,000	6 mo pris.; $5,000	3 mo pris.; [illegible]	48
Case 7: Possession of heroin	6 mo pris.; 18 mo prob.	3 mo pris.	1 yr prob.	39
Case 8: Mail fraud	2 mo pris.; 2 yr prob. [§ 4209]	3 yr prob.	1 yr prob.	41
Case 9: Eluding examination and inspection by immigration officers; illegal entry after deportation.	1 mo pris.; 2 yr unsup. prob.	2 yr unsup. prob.	Susp. of [illegible]	49
Case 10: Postal embezzlement	3 yr prob.	2 yr prob.	1 yr prob.	48
Case 11: Bribery	2 yr prob.; $7,500	$7,500; 2 yr unsup. prob.	$2,500	43
Case 12: Possession of unregistered firearm	2 yr prob.	1 yr prob.	6 mo prob.	44
Case 13: Possession of counterfeit currency	2 yr prob.	2 yr prob.	2 yr prob.	48
Case 14: Altering a forged U.S. Treasury check	2 yr prob.	2 yr prob.	1 yr prob.	39
Case 15: Operating an illegal gambling business	2 yr prob.; $5,000	2 yr prob.; $1,000	1 yr prob.; [illegible]	45
Case 16: Bank embezzlement	2 yr prob.	2 yr prob.	2 yr unsup. prob.	42
Case 17: Interstate transportation of stolen securities	3 yr prob.	2 yr prob.	1 yr prob.	46
Case 18: Mail theft	2 yr prob.	2 yr prob.	1 yr prob.	48
Case 19: Conspiracy to commit securities fraud	2 yr prob.; $400	1 yr prob.; $7,500	$2,500	47
Case 20: Perjury	1 yr prob.; $1,500	1 yr prob.; $500	$1,000	48

Note.—References to "(a)(2)" signify a sentence pursuant to former 18 U.S.C. § 4208(a)(2), under which the defendant is given an indeterminate sentence and is eligible for [illegible] by the Board of Parole. References to "§ 4209" signify a sentence pursuant to former 18 U.S.C. § 4209, under which young adult offenders (under age 26) are given specialized treatment. References to "YCA indet." signify an indeterminate sentence for young offenders under age 22 pursuant to 18 U.S.C. § 5010.
See also Seymour, supra note 21 at 166–67.

In one extortion case, for example, the range of sentences varied from twenty years imprisonment and a $65,000 fine to three years imprisonment and no fine.[23]

The findings of the Second Circuit study have been reconfirmed in a study performed for the Department of Justice in which 208 active Federal judges specified the sentences they would impose in 16 hypothetical cases, 8 bank robbery cases, and 8 fraud cases. In only 3 of the 16 cases was there a unanimous agreement to impose a prison term. Even where most judges agreed that a prison term was appropriate, there was a substantial variation in the lengths of prison terms recommended. In one fraud case in which the mean prison term was 8.5 years, the longest term was life in prison. In another case the mean prison term was 1.1 years, yet the longest prison term recommended was 15 years.[24]

The study also concluded that, while 45 percent of the variance in sentences for hypothetical cases was attributable to differences in offense and offender characteristics, 21 percent was directly attributable to the fact that some judges tend to give generally tough or generally lenient sentences,[26] and 22 percent of the variation was attributable to interactions between the "judge factor" and other factors. For example, some judges sentence more harshly for a particularly offense than other judges even though they do not sentence more harshly overall, and some judges sentence relatively more harshly than other judges if the defendant has a prior record.[27]

Following is the table from the report showing the differences in decisions whether to incarcerate and the length of incarceration:

EXHIBIT III.8.—SUMMARY OF JUDGES' SENTENCING RECOMMENDATIONS FOR THE 16 SCENARIOS [1]

	Percentage recommending imprisonment (N = 208)	Mean prison term (years) (N = 208)	Longest prison term (years)	Standard deviation (years)	Mean supervised time (years) (N = 212)	Mean fine (N = 170)
1. Bank robbery	95.6	7.3	25	6.1	1.6	[illegible]
2. Fraud	98.1	4.7	47	[illegible]	1.1	[illegible]
3. Bank robbery	[illegible]	12.4	25	7.0	1.7	[illegible]
4. Fraud	[illegible]	1.9	10	[illegible]	[illegible]	[illegible]
5. Bank robbery	[illegible]	11.1	25	[illegible]	[illegible]	[illegible]
6. Fraud	99.0	4.0	25	[illegible]	1.4	[illegible]
7. Bank robbery	100.0	15.3	25	6.2	2.1	[illegible]
8. Fraud	46.2	1.1	15	2.3	2.4	[illegible]
9. Fraud	100.0	8.5	(²)	4.2	1.6	6,221
10. Bank robbery	97.6	6.6	22	4.0	1.5	1,276
11. Fraud	99.0	5.4	15	4.2	1.3	4,688

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[23] Partridge and Eldridge, *id.* at 5. Recent studies of other jurisdictions confirm the existence of widespread sentencing disparity. See, *e.g.*, L. Wilkins, J. Kress, D. Gottfredson, J. Calpin, and A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (1978) (1976 study of Colorado and Vermont); Austin & Williams III, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. Crim. L.C. & P.S. 306 (1977) (study of 47 Virginia district court judges); Diamond and Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975) (Northern District of Illinois and Eastern District of New York); Comment, *Texas Sentencing Practices: A Statistical Study*, 45 Tex. L. Rev. 471 (1967) (Texas).

[24] Federal Sentencing Study, *supra* note 18 at III-16.

[25] *Id.*, Exhibit III-8.

[26] *Id.* at III-17.

[27] *Id.* at III-17 to III-18. For more details of the study, see Bartolomeo, Clancy, Richardson, and Berger, *Sentence Decision Making: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity* (1981).

EXHIBIT III.8.—SUMMARY OF JUDGES' SENTENCING RECOMMENDATIONS FOR THE 16 SCENARIOS ¹—Continued

	Percentage recommending imprisonment (N=208)	Mean prison term (years) (N=208)	Longest prison term (years)	Standard deviation (years)	Mean supervised time (years) (N=211)	Mean fine (N=110)
12. Bank robbery	100.0	10.0	25	3.0	1.1	1,818
13. [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
14. Bank robbery	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
15. [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
16. Bank robbery	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
All bank robberies	[illegible]	[illegible]			[illegible]	[illegible]
All frauds	85.3	3.2			1.7	2,154

¹ Scenarios are described in Exhibits III.6 and III.7.
² Life.

In addition, as indicated in the following chart, a study of the two districts in each of the 11 Federal judicial circuits that sentenced the greatest number of offenders in 1972 for a selected group of offenses shows widespread sentencing disparity:

TABLE 1.—AVERAGE SENTENCE LENGTH FOR SELECTED OFFENSES, IN 1972

[In months]

	Homicide and assault	Robbery	Burglary	Larceny	Auto theft	Forgery and counterfeiting
National average	102	120	63	40	38	42
Maine				144 (+104)	21 (−17)	24 (−18)
Massachusetts	48 (−54)	115 (−5)	40 (−23)	36 (−4)	20 (−18)	32 (−10)
New York (northern)		39 (−81)		11 (−29)	9 (−29)	12 (−30)
New York (eastern)	18 (−84)	130 (+10)	2 (−61)	48 (+8)	12 (−26)	49 (+7)
New Jersey	11 (−91)	103 (−17)	27 (−36)	50 (+10)	32 (−6)	29 (−13)
Pennsylvania (eastern)	102 (0)	88 (−32)		55 (+15)	49 (+11)	30 (−12)
Maryland	6 (−96)	146 (+26)	61 (−2)	45 (+5)	49 (+11)	40 (−2)
Virginia (eastern)	66 (−36)	135 (+15)	81 (+18)	50 (+10)	41 (+3)	39 (−3)
Florida (middle)		126 (+6)	38 (−25)	37 (−3)	32 (−6)	41 (−1)
Texas (northern)	62 (−40)	224 (+104)	46 (−17)	42 (+2)	39 (+1)	65 (+23)
Kentucky (eastern)	24 (−78)	128 (+8)	167 (+104)	25 (−15)	32 (−6)	20 (−22)
Ohio (northern)	28 (−74)	119 (−1)	[illegible]	29 (−11)	31 (−7)	[illegible]
Illinois (northern)	[illegible]	81 (−39)	30 (−33)	40 (0)	45 (+7)	[illegible]
Indiana (southern)	[illegible]	101 (−19)	[illegible]	34 (−6)	32 (−6)	[illegible]
Missouri (eastern)	[illegible]	186 (+66)	60 (−3)	54 (+14)	44 (+6)	[illegible]
Missouri (western)	[illegible]	120 (0)		57 (+17)	[illegible]	[illegible]
California (northern)	[illegible]	113 (−7)	130 (+67)	32 (−8)	42 (+4)	[illegible]
California (central)	160 (+58)	96 (−24)	24 (−39)	40 (0)	41 (+3)	43 (+1)
Kansas	74 (−28)	115 (−5)		46 (+6)	47 (+9)	63 (+21)
Oklahoma (western)	29 (−73)	85 (−35)	48 (−15)	31 (−9)	36 (−2)	41 (−1)
District of Columbia	161 (+59)	103 (−17)	84 (+21)	42 (+2)	40 (+2)	67 (+25)

Note.—The Federal district courts for each of the 11 circuits were chosen on the basis of the 2 districts in each circuit that sentenced the greatest number of offenders for the selected offenses.

Source: Administrative Office of the United States Courts, "Federal Offenders in United States District Courts," 1972, app. table X-4. O'Donnell, Churgin and Curtis, "Toward A Just and Effective Sentencing System: Agenda For Legislative Reform" (Praeger, 1977).

The Committee finds that this research makes clear that variation in offense and offender characteristics does not account for most of the disparity.[28]

Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public. Such sentences are unfair in more subtle ways as well. Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons.[29]

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[28] See Subcommittee Criminal Code Hearings, Part XIII, at 8870, 8881, 8897, 8903, 8916, 8960; Criminal Code Hearings, Part XVI, at 11752, 11786–87, 11911.

b. Policies and practices of the Parole Commission

In response to the lack of consistency apparent in the prison sentences imposed by the Federal Courts, the Parole Commission, in turn, releases prisoners according to its view of the appropriate term of imprisonment. In recent years, the Parole Commission has attempted to perform its function with two goals in mind: first, it has sought to reduce unwarranted disparity in judicially imposed prison terms by utilizing parole guidelines[30] that recommend appropriate periods of incarceration for different offenses and offender characteristics. Second, it has sought to increase certainty in prison release dates by setting a "presumptive release date" in most cases within a few months of commencement of the term of imprisonment.[31]

By dividing the sentencing authority between the judge and the Parole Commission, however, current law actually promotes disparity and uncertainty. First, the dangers of an unfettered exercise of discretion can occur at the time that an offender is released on parole as well as at the initial sentencing. For this reason, any comprehensive plan for reform should (1) take into account the division of authority that currently exists between the sentencing judge and the Parole Commission, (2) consolidate that authority, and (3) develop a system of sentencing whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called "good time."[32]

Second, the existence of the Parole Commission invites judicial fluctuation by encouraging judges to keep the availability of parole in mind when they sentence offenders.[33] Sentencing judges, trying to anticipate what the Parole Commission will do, undoubtedly are tempted to sentence a defendant on the basis of when they believe the Parole Commission will release him.[34] In doing so, some judges

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[29] Subcommittee Criminal Code Hearings, Part XIII, at 9095.

[30] 28 C.F.R. § 2.20 (1982). "Whether wisely or not, Congress has decided that the [Parole] Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges." *United States* v. *Addonizio*, 442 U.S. 178, 188–189 (1979), citing S. Cong. Rept. 94–368, 94th Cong., 1st Sess., at 19 (1976).

[31] 28 C.F.R. § 2.12 (1982). The date may be advanced only for superior program achievement (see 28 C.F.R. § 2.60 (1982)) or for other "clearly exceptional circumstances" (28 C.F.R. § 2.14(a)(2)(ii)). It may be retarded or rescinded for disciplinary infractions (28 C.F.R. § 2.14(a)(2)(iii) and 2.36).

[32] See 18 U.S.C. 4161–4166.

[33] The presentence report informs the sentencing judge as to the probable application of the parole guidelines in each case. See Division of Probation, Administrative Office of the United States Courts, *The Presentence Investigation Report*, pp. 6 and 16 (1978). It is probable that some judges, believing that the parole release date specified in the guidelines is reasonable, impose sentences to imprisonment that assure parole eligibility during the guidelines range applicable in a particular case, while other judges may deliberately impose sentence below the parole guideline believing that it is too harsh or set a high sentence with parole eligibility above the guideline if it is believed to be too low.

[34] It is ironic that those who would retain parole on the ground that it is a valuable "safety valve" designed to shorten lengthy sentences imposed by judges who would ignore the guidelines

Continued

deliberately impose sentences above the parole guidelines, leaving the Parole Commission to set the presumptive release date. Other judges impose sentences consistent with or below the guidelines in order to retain control over the release date.[35]

A few examples may be helpful to clarify this and the following discussion. Suppose the parole guidelines prescribe a range of forty to fifty-two months of time to be served for a given offense. This prescription is based upon the offense and offender characteristics present in the particular case. Suppose further that the offense carries a statutory maximum prison sentence of twenty years. The judge sentences the offender to a term of three years imprisonment. By statute, the prisoner is eligible for parole after serving one-third of his sentence (one year).[36] and may not serve more than the maximum (three years) for that conviction.[37] The parole guidelines figure (forty to fifty-two months) never comes into play, and the Commission is powerless to make this particular sentence conform to the generally applied term prescribed by the guidelines. In such cases the Parole Commission generally will not parole the prisoner; thus, he serves the maximum sentence less good time.[38]

The second example follows from the first. If the offender is not sentenced to any term of imprisonment, he does not come within the jurisdiction of the Commission, and the guidelines are irrelevant.

In the third example, the judge sentences the offender to a prison term of fifteen years, and again the parole guidelines are circumvented. In this case the prisoner will not be eligible for parole until he serves one-third of his sentence (five years) unless the judge specifies that the prisoner should be eligible for an earlier parole date.[39] The five-year minimum is above the range prescribed by the guidelines. Here, the best that the Commission can do to eliminate sentence disparity is to parole the prisoner as soon as he is eligible, that is, after he has served five years of his sentence.

These examples make it clear that, operating under a guidelines system, the Parole Commission cannot completely eliminate unwarranted sentencing disparity if the courts do not cooperate. It should be added that even if the Commission abandoned its guidelines and attempted merely to carry out the courts' intentions regarding offenders sentenced to imprisonment, the chance of success

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established under this title could very well be assuring that longer sentences would be imposed by judges trying to structure sentences to overcome prospectively the anticipated reduction by the Parole Commission. In addition, if parole eligibility is retained for a substantial percentage of a prison term, the sentencing guidelines would necessarily recommend far longer prison terms than if there were no parole release system. This would virtually assure that prison terms imposed by judges would bear no more resemblance to terms actually served than they do today. About half the prisoners within the jurisdiction of the Parole Commission are released at the expiration of sentence, less good time, rather than on parole. Of the 7,077 persons who were sentenced to terms of imprisonment of over one year and who were released from prison in the fiscal year ended September 30, 1977, 3,492 were released on parole. Federal Prison System, *Statistical Report Fiscal Year 1977,* Table C–1, p. 175. Comparable Bureau of Prisons statistics for fiscal year 1982 indicate that of 6,968 prisoners sentenced to terms of imprisonment in excess of one year who were released that year, 3,956 were released on parole. Federal Prison System, Statistical Report Fiscal year 1982, Table C–1.

[35] See 18 U.S.C. 4163.

[36] 18 U.S.C. 4205(a).

[37] 18 U.S.C. 4163.

[38] Criminal Code Hearings, Part XIV, at 10648–10651, 10665 note 29.

[39] 18 U.S.C. 4205(b)

would be small. At present, judges need not specify the reasons for their sentencing decisions, and usually they do not indicate the length of time they expect an offender to spend in prison. Thus, the Commission seldom has enough information upon which to base a release decision that conforms to the courts' intentions.

The problems with the present system do not end here, however. The parole guidelines themselves contribute to disparity because the offenses are grouped according to "severity." Offenses are rarely distinguished according to such characteristics as the amount of harm done by the offense, the criminal sophistication of the offender, or the importance of the offender's role in an offense committed with others.[40] Similarly, in classifying offenders according to their criminal histories, the guidelines make few distinctions between major and minor previous offenses and give the same weight to all but very old prior offenses.[41]

Additionally, the parole guidelines frequently fail in practice to achieve their goal of reducing unwarranted sentencing disparities. In a recent study by the General Accounting Office, 35 hearing examiners of the Parole Commission were asked to indicate the release date they would set for each of a sample of 30 cases. The study found substantial disparities in the release dates. In 28 of the 30 cases there was a variation of more than one year.[42] The GAO attributed the inconsistencies to the lack of training of hearing examiners, who are not lawyers, and to weaknesses in the guidelines themselves.[43]

Nor can the Parole Commission, by setting a presumptive release date once an offender is within its jurisdiction, eliminate entirely the uncertainty inherent in current sentencing procedures.

As the previous examples made clear, a court-imposed term of imprisonment in excess of one year frequently has little to do with the amount of time that an offender will spend in prison. The announced term represents only the maximum length of time the offender may spend in prison if he earns no good time credits[44] and if the Parole Commission does not set a release date that falls before the date of expiration of the sentence.[45]

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[40] Recent amendments to the offense severity index for the parole guidelines provide more detailed distinctions in offense descriptions than previous formulations. See 47 Fed. Reg. 56336–41 (Dec. 16, 1982).

[41] See items A, B, and D in the salient factor score, 28 C.F.R. § 2.20 and the scoring instructions for those factors in 28 C.F.R. § 2.20–07.

[42] Comptroller General of the United States, *Federal Parole Practices: Better Management and Legislative Changes Are Needed* 15–20 (Rept. No. B–133223, 1982).

[43] *Id.* at 12–23.

[44] See 18 U.S.C. 4161 *et seq.*

[45] See 18 U.S.C. 4163.

The Supreme Court, in *United States* v. *Addonizio, supra* note 30, held that a sentence was not subject to collateral attack under 28 U.S.C. 2255 in a case in which the United States Parole Commission did not release the defendant at the time that the sentencing judge expected. The sentencing judge indicated in his decision in the section 2255 proceeding that he intended that, if the defendant's prison behavior was "exemplary," he would be released on parole after serving one-third of a 10-year term of imprisonment. The U.S. Parole Commission, considering not the defendant's behavior in prison but the seriousness of the offense, refused to release the defendant at that time. In denying Federal court jurisdiction over the section 2255 motion, the Supreme Court said:

"The import of [the] statutory scheme is clear: the judge has no enforcible expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make either at the time of sentencing or later if his expectations are not met. To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack

Continued

The presumptive release date set by the Commission is also subject to change, however. In a given case the Commission may either (1) tell a prisoner that he will be released at the expiration of his sentence less good time or (2) set another tentative release date. In the first case, the date of release is subject to constant adjustment by the Bureau of Prisons because of the withholding or forfeiture of all or part of the good time the prisoner has earned for compliance with institutional rules [46] and the possible restoration of part or all of that lost good time at a later date.[47] Alternatively, if the Commission decides to set a separate presumptive release date, it may move the date forward in exceptional cases or may delay it for disciplinary problems in prison. Finally, the Commission may adjust the release date for a rules violation that resulted in the withholding or forfeiture of good time and may delay the release date even though the Bureau of Prisons restored all good time lost for the same violation.[48]

c. *Conclusion*

These accounts of the present practices of the Federal courts and of the Parole Commission clearly indicate that sentencing in the Federal courts is characterized by unwarranted disparity and by uncertainty about the length of time offenders will serve in prison.

The lack of reasonable consistency in the sentences handed down by the courts is due in large part to the lack of a comprehensive Federal sentencing law. Federal statutes should provide clear guidance to Federal judges on how to select from among the available alternatives an appropriate sentence to impose upon the particular defendants before them. This disparity is fair neither to the offenders nor to the public.

The efforts of the Parole Commission to alleviate this disparity unfortunately contribute to a second grave defect of present law: no one is ever certain how much time a particular offender will serve if he is sentenced to prison. The present system encourages judges to sentence with the parole guidelines in mind, and it encourages the Parole Commission to release prisoners with its own purposes—not those of the sentencing judge—in mind.

Even in those cases where the Commission can adjust court-imposed sentences in order to bring the actual prison terms in line with those for similarly situated offenders across the country, the actual terms to be served are subject continually to the "good time" adjustments by the Bureau of Prisons and to counter-adjustments by the Parole Commission. Thus, prisoners often do not really know how long they will spend in prison until the very day they are released. The result is that the existing Federal system lacks the sureness that criminal justice must provide if it is to

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as a mechanism for ensuring that these expectations are carried out would substantially undermine the congressional decision to entrust release decisions to the Commission and not the courts. Nothing in § 2255 supports—let alone mandates—such frustration of congressional intent." *Id.* at 190. Thus, "[w]hen parole boards exercised authority over release, judges' sentences were of secondary importance * * *". National Academy of Sciences, Panel on Sentencing Research, *Research on Sentencing: The Search for Reform* 57 (A. Blumstein, J. Cohen, S. Martin & M. Tonry, eds., 1983) (hereinafter cited as National Academy of Sciences Report).

[46] 18 U.S.C. 4165.

[47] 18 U.S.C. 4166.

[48] 28 C.F.R. §§ 2.12(d), 2.14(a)(2)(ii), 2.14(a)(2)(iii), 2.34, 2.36(a)(1), 2.60.

retain the confidence of American society and if it is to be an effective deterrent against crime.

3. Limited availability of sentencing options

Current law is not particularly flexible in providing the sentencing judge with a range of options from which to fashion an appropriate sentence. The result is that a term of imprisonment may be imposed in some cases in which it would not be imposed if better alternatives were available. In other cases, a judge might impose a longer term than would ordinarily be appropriate simply because there were no available alternatives that served the purposes he sought to achieve with a long sentence. For example, maximum fines in current law are generally too small to provide punishment and deterrence to major offenders.[49] Frequently, a fine does not come close to the amount the defendant has gained by committing the offense. The statutes expressly suggest only a few possible conditions that may be placed upon a term of probation and do not provide specifically for alternatives to all or part of a prison term such as community service or brief intervals, such as evenings or weekends, in prison. Finally, current law makes no provision for notifying victims of a fraudulent offense of the conviction so that they may seek civil remedies.

SENTENCING PROVISIONS IN THE BILL

1. Comprehensiveness and consistency

Title II of S. 1762 contains a comprehensive statement of the Federal law of sentencing. It outlines in one place the purposes of sentencing, describes in detail the kinds of sentences that may be imposed to carry out those purposes, and prescribes the factors that should be considered in determining the kind of sentence to impose in a particular case.

Title II gives congressional recognition to four purposes of sentencing: (1) the need to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment; (2) the need to afford adequate deterrence to criminal conduct; (3) the need to protect the public from further crimes of the defendant; and (4) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.[50]

Title II specifies that an individual may be sentenced to a term of probation, a fine, or a term of imprisonment, or to a combination of a fine and probation or a combination of a fine and imprisonment.[51] An organization may be sentenced to a term of probation or a fine, or to a combination of these.[52] Either an individual or an organization may be ordered as a part of the sentence to forfeit any interest in a racketeering syndicate,[53] to give notice to victims of a fraudulent offense,[54] or to make restitution to the victim of an offense that causes bodily injury or death or that results in damage to or loss or destruction of property.[55]

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[49] There are a few exceptions in recently enacted provisions. See, e.g., 15 U.S.C. 1, 2, and 3.

[50] Proposed 18 U.S.C. 3553 (a)(2).

[51] Proposed 18 U.S.C. 3551(b).

[52] Proposed 18 U.S.C. 3551(c).

[53] Proposed 18 U.S.C. 3554.

[54] Proposed 18 U.S.C. 3555

Title II creates a grading scheme by which each offense can be ranked according to its relative seriousness.[56] This device is used to define the maximum terms of imprisonment,[57] the maximum fines,[58] the maximum terms of probation[59] and the maximum terms of supervised release[60] for each grade of offense. The definition of maximum prison terms does not alter existing statutory maximums: the existing Federal statutes still determine the maximum terms of imprisonment.[61] The provision is intended merely to provide a useful scheme for future Congressional classification of criminal statutes. On the other hand, the proposed maximums for fines, probation, and supervised releases will supersede existing law when the bill is enacted into law.[62] The grading scheme in title II can be used by the Sentencing Commission when it makes recommendations concerning legislative changes needed to improve Federal sentencing practices, and the Committee strongly encourages such recommendations.

The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently.[63] This approach will eliminate specialized sentencing statutes that cover narrow classes of offenders and will thus eliminate the problem created by an offender whose case might fall into more than one category. The sentencing guidelines will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender. The guidelines will be supplemented by policy statements that will address questions concerning the appropriate use of the sanctions of criminal forfeiture, order of notice to victims, and order of restitution and the use of conditions of probation and post-release supervision. The formulation of sentencing guidelines and policy statements will provide an unprecedented opportunity in the Federal system to look at sentencing patterns as a whole to assure that the sentences imposed are consistent with the purposes of sentencing. At the same time, the use of sentencing guidelines and policy statements is intended to assure that each sentence is fair compared to all other sentences.

The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence. If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the judge may sentence the defendant outside the guidelines.[64] A sentence that is above the guidelines may be appealed by the defendant; [65] a sentence below the guidelines may be appealed by the government.[66] The case law that is developed from these appeals may, in turn, be used to further refine the guidelines.

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[55] Proposed 18 U.S.C. 3556, which incorporates by reference 18 U.S.C. 3663 and 3664. Sections 3663 and 3664 were enacted as 18 U.S.C. 3579 and 3580 by section 5 of the Victim and Witness Protection Act of 1982, and would be renumbered as sections 3663 and 3664 by section 202(a) of this bill.

[56] See proposed 18 U.S.C. 3581(a).

[57] Proposed 18 U.S.C. 3581(b).

[58] Proposed 18 U.S.C. 3571(b).

[59] Proposed 18 U.S.C. 3561(b) and 18 U.S.C. 3563(a) and (b).

[60] Proposed 18 U.S.C. 3583.

[61] Proposed 18 U.S.C. 3559(b)(2).

[62] Proposed 18 U.S.C. 3559(b)(1). An exception is made when the maximum fine in current law is higher than that specified in title II of this bill; in that case, the current maximum would apply.

[63] See proposed 28 U.S.C. 991(b) and 994(a); proposed 18 U.S.C. 3553(b).

2. Assuring fairness in sentencing

A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.[67] The bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing.[68] He is then to determine which sentencing guidelines and policy statements apply to the case. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics and impose sentence according to the guideline recommendation or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance and impose sentence outside the guidelines.[69] A sentence outside the guidelines is appealable, with the appellate court directed to determine whether the sentence is reasonable.[70] Thus, the bill seeks to assure that most cases will result in sentences within the guideline range and that sentences outside the guidelines will be imposed only in appropriate cases.[71]

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to current law.[72] Under a sentencing guidelines system, the judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. This examination is made on the basis of a presentence report that notes the presence or absence of each relevant offense and offender characteristics. This will assure that the probation officer and the sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.

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[64] Proposed 18 U.S.C. 3553(b).

[65] Proposed 18 U.S.C. 3742(a).

[66] Proposed 18 U.S.C. 3742(b).

[67] See proposed 28 U.S.C. 991(b)(2); proposed 18 U.S.C. 3553(a)(6).

[68] Proposed 18 U.S.C. 3553(a).

[69] Proposed 18 U.S.C. 3553(b).

[70] Proposed 18 U.S.C. 3742.

[71] The United States Parole Commission currently sets prison release dates outside its guidelines in about 20 percent of the cases in its jurisdiction. United States Parole Commission, *Report for October 1, 1978 to September 30, 1980,* Table III at 22 (1981). It is anticipated that judges will impose sentences outside the sentencing guidelines at about the same rate or possibly at a somewhat lower rate since the sentencing guidelines should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the parole guidelines. See also National Academy of Sciences Report, *supra* note 45 at 29, which concludes that, "With voluntary guidelines, studies have found no evidence of systematic judicial compliance; with changes directly mandated by statute, as in the cases of mandatory and determinate sentencing laws [such as the California system of legislated sentences], studies have found formal (but not necessarily substantive) judicial compliance. However, under Minnesota's presumptive sentencing guidelines [which were promulgated under legislation substantially similar to this bill], the presence of effective external enforcement mechanisms, in the form of appellate review of sentences and close monitoring by the Guidelines Commission, has resulted in generally high rates of substantive compliance with guidelines by judges in that State."

The Parole Commission has argued that, even if a sentencing guidelines system is adopted, the Commission should be retained to set the actual release date for a person sentenced by a judge to a term of imprisonment.[73] Under its proposal, the judge, after considering the sentencing guidelines, would determine whether to send a defendant to prison and, if so, would set the maximum prison term that could be served by the defendant. Shortly after the defendant begins his term, the Parole Commission, using its own guidelines, would set a presumptive release date subject to good behavior and could later adjust that date for noncompliance with prison rules. It bases this belief on the argument that a small collegial body will be better able than the Federal judges to achieve the goal of elimination of unwarranted sentencing disparity. The Committee strongly disagrees with the Parole Commission. The proposal is based on the same discredited assumptions as the present system and is entirely at odds with the rationale of the proposed guidelines system.[74] Moreover, it has several practical de-

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[72] Recent studies indicate that sentences too often reflect the personal attitudes and practices of individual sentencing judges. Sentences also vary depending upon the availability of pertinent information regarding the offenses and offenders and upon the often inconsistent recommendations of probation officers. See National Academy of Sciences Report, *supra* note 45 at 44, citing Carter and Wilkins, "Some Factors in Sentencing Policy," 58 *J. Crim. Law, Criminology and Police Science* 503–514 (1967), and D. Townsend, Y. Avichai, and G. Peters, *Technical Issue Paper on Presentence Investigation Reports* (Report No. 3, Critical Issues in Adult Probation, Center for Law Enforcement and Correctional Justice, Westerville, Ohio, 1978).

[73] Subcommittee Criminal Code Hearings, Part XIII, at 9020–28.

[74] The Committee's view that parole should be abolished in the context of a completely restructured guidelines sentencing system is consistent with the general sentencing philosophy expressed by numerous commentators on the current sentencing process. See, e.g., P. O'Donnell, J. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* 13, 14, 28, 56 (New York 1977) (the study on which the sentencing provisions in S. 668 are largely based) ("* * * [O]ur decision to recommend a guideline approach for sentencing requires abolition of parole, at least as that process has been administered in the past"); Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Cr. L. Rev. 353 (Spring 1979); Frankel, *Panel on Sentencing Provisions in the Proposed Federal Code*, 80 F.R.D. 151, 153 (1979) ("Let the judges judge and be accountable. The idea of a parole board or commission serving in effect to review the judges was not sound when it was more or less covert; it does not improve as an express proposition."); Newman, *A Better Way to Sentence Criminals*, 63 A.B.A.J. 1563, 1566 (November 1977) ("By rating cases according to offense severity and offender backgrounds only and abandoning any pretense of being able to perform the impossible task of determining when a prisoner has been 'rehabilitated,' the parole commission has demonstrated abundantly that it can now go out of business."); Morris, *Toward Principled Sentencing*, 37 Md. L. Rev. 276 (1977); Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing*, 7 Hofstra L. Rev. 281, 313 (1979), van den Haag, *Punitive Sentences*, 7 Hofstra L. Rev. 123, 135 (1978); Genego, Goldberger, and Jackson, *Parole Release Decision-making and the Sentencing Process*, 84 Yale L.J. 897 (March 1975) ("[T]he Parole Board can make no greater contribution than can the judiciary in fairly effectuating the goals of punishment or reducing the most serious sentencing disparity."); Pierce, *Rehabilitation in Corrections: A Reassessment*, 38 Fed. Probation 14–19 (1974); Fairbanks, *Parole—A Function of the Judiciary?* 27 Okla. L. Rev. 657 (1974) ("* * * [P]arole boards do not have information reasonably related to prediction, they have no apparent predictive skills, they are not even the putative experts, the entire business of predicting recidivism even by so-called experts is so dubious that it can hardly stand as a rationale for the discretionary release aspect of parole. * * * The case for the abolishment of parole is not as

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ficiencies that would result in continuing some of the unfairness and uncertainty in the current system.

First, it would perpetuate the current problem that judges do not control the determination of the length of a prison term even though this function is particularly judicial in nature.[75] The better view is that sentencing should be within the province of the judiciary. Indeed, it is arguable that the Parole Commission by basing its decision on factors already known at the time of sentencing, has already usurped a function of the judiciary.[76]

Second, the argument that the Parole Commission, because it is a "small collegial body," is able to render more consistent decisions than the Federal judges would be, is debatable. Initial decisions of the Parole Commission are made by at least 35 hearing examiners, not by the nine Commissioners. It seems unlikely that more than 40 people making administrative decisions would result in substantially less inconsistency than a few hundred people making judicial

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radical or as difficult as might first appear. Having shown parole to be ineffective, and not likely to improve; and having also shown that in terms of what parole actually does it is duplicative. * * *"; McAnany, Merritt and Tromanhauser, *Illinois Reconsiders Flat Time: An Analysis of the Impact of the Justice Model*, 52 Chicago-Kent L. Rev. 640 (1976); Stanley, *Prisoners Among Us: The Problem of Parole* 77–79 (Washington, D.C. 1976); N. Morris, *The Future of Imprisonment* (Chicago, 1974).

A number of witnesses at the Committee hearings on the proposed revision of the Federal Code also expressed a sentencing philosophy consistent with the abolition of parole in the context of comprehensive sentencing reform. See, e.g., Criminal Code Hearings, Part XVI, at 11765–66 (Statement of Attorney General William French Smith); pp. 11787–88 (Statement of former Attorney General Griffin B. Bell, Chairman of the Attorney General's Task Force on Violent Crime); Subcommittee Criminal Code Hearings, Part XIII, at pp. 8595–96 (Testimony of Attorney General Griffin B. Bell); pp. 9008–09 (Statement of Ronald L. Gainer); p. 8961 (Testimony of former Judge Harold Tyler: "[I]f the [Sentencing] Commission works well there would then be no need of parole commissions as we now know them * * *"); p. 8973 (Testimony of Judge Morris Lasker: "I do believe that history is showing that parole as an institution is an idea whose time may be past,"); p. 9127 (Statement of Kay Harris: "NMPC [the National Moratorium on Prison Construction] favors in principle the abolition of parole, but believes that parole abolition should not be attempted in isolation from other major criminal justice system changes * * * [W]e believe that the parole system is fatally flawed conceptually, based as it is on prediction of future individual conduct. Parole has often served to increase, rather than decrease, arbitrary and inequitable treatment of prisoners.")

The House Judiciary Subcommittee on Criminal Justice, in the course of its consideration of a revised Federal Criminal Code in the 96th Congress, also received testimony and letters in support of parole abolition. Former Judge Harold Tyler in his prepared statement presented to the Committee on October 11, 1979, stated that the proposal to retain the Parole Commission for five years under consideration by the Subcommittee, was "extremely unwise" for several reasons: first, "it will be impossible to understand or know whether judges in fact were sentencing an offender to the amount of time they actually intended or to twice the time they intended in anticipation that the Parole Commission would grant one-half parole"; second, there "is the likelihood that there would be confusion and unfairness to sentenced offenders and to the public at large"; third, "it seems to me that continuing the Parole Commission is really unnecessary in order * * * to deal with that occasional case where, in a determinate sentencing scheme, an offender receives a sentence which turns out to be manifestly unfair or 'wrong', particularly in light of post-sentence developments" and that there are alternative methods for solving this problem. *Revision of the Federal Criminal Code*, Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 1911 [hereinafter cited as *House Hearings*]. See also *House Hearings*, *id.* at 1832 (Testimony of Norman Carlson); letter of Harvey A. Silverglate, a member of the Executive Board of the Massachusetts Chapter of the American Civil Liberties Union, to Congressman Robert F. Drinan, Chairman, Subcommittee on Criminal Justice, House Committee on the Judiciary, dated October 4, 1979, suggesting abolition of parole; and letter from Circuit Judge Jon O. Newman, United States Court of Appeals for the Second Circuit, to Congressman Drinan, dated September 14, 1979, opposing even the temporary retention of the Parole Commission in a sentencing guidelines system and suggesting possible "safety valves" in the unusual case in which one is needed. *House Hearings*, *id.* at 4539–43.

[75] See Subcommittee Criminal Code Hearings, Part XIII, at 9028–29 (Letter of Dorothy Parker, Commissioner of United States Parole Commission).

[76] *Ibid.* The Committee does not, however, agree with the suggestion by Mrs. Parker that the solution to this problem is to transfer the Parole Commission to the judicial branch; while implementation of that suggestion might resolve the theoretical problem caused by the Parole Commission's current position in the executive branch, it would not solve any of the other problems discussed here.

decisions after hearing arguments presented by counsel for both sides, which are subject to appellate review by eleven courts of appeals sitting in panels and, ultimately, by a single Supreme Court. The recent GAO study of the operations of the United States Parole Commission[77] concluded that the hearing examiners made errors in applying the guidelines in 53 percent of the cases studied, and most of these errors were not corrected in the internal appeals process.[78] GAO specifically found that one reason the appellate process did not result in correction of errors in application of the guidelines was a Parole Commission policy that barred a decision more adverse to the prisoner than the decision appealed, even if the early release date was the result of an erroneous application of the guidelines.[79]

Third, it would draw an artificial line between imprisonment and probation, forcing the sentencing guidelines system and the judges to formulate sentencing policy that assumes that a term of imprisonment, no matter how brief, is necessarily a more stringent sentence than a term of probation with restrictive conditions and a heavy fine. Such an assumption would be a roadblock to the development of sensible comprehensive sentencing policy.

Fourth, it would continue the current law problem that actual terms of imprisonment are determined in private rather than public proceedings.

Fifth, the Parole Commission might be basing decisions on a different sentencing philosophy than is reflected in the sentencing guidelines. The Parole Commission has suggested that, at least for the first few years of sentencing guidelines, the Parole Commission should issue its own guidelines for lengths of prison terms rather than rely on guidelines promulgated by the Sentencing Commission.

Finally, under the Parole Commission's proposal the procedures for review of a sentence outside the guidelines—for example, when both a term of imprisonment and a fine outside the guidelines are imposed—would be virtually unworkable. Apparently, the fine level would be reviewed publicly in the courts of appeals while the term of imprisonment would be reviewed privately by the Parole Commission. It is even possible that the Parole Commission under its proposal would review and amend a sentence after a United States court of appeals had already found it to be reasonable—a situation that the Committee finds totally unacceptable.

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment. The Committee believes, however, that it is unnecessary to continue the expensive[80] and cumbersome Parole Commission to deal with the relatively small number of cases in which there may be justification for reducing a term of imprisonment. The bill, as reported, provides instead in proposed 18 U.S.C. 3583(c) for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.

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[77] General Accounting Office, *Federal Parole Practices: Better Management and Legislative Changes Are Needed*, Report No. B-133223 (1982).

[78] *Id.* at ii, 11-56. The Parole Commission has criticized the methodology of the GAO study, particularly on the basis of its use of complex cases rather than a random sample of cases before the Commission. *Id.* at 187-90.

[79] *Id.* at 39, 75-76. The General Counsel of the Parole Commission has questioned the legality of a parole release decision based on an incorrect interpretation of the guidelines. *Id.* at 75-76.

3. Certainty in release date

Under the bill, the sentence imposed by the judge will be the sentence actually served. A sentence that exceeds one year may be adjusted at the end of each year by 36 days for a prisoner's compliance with institutional regulations. Should a prisoner demonstrate less than satisfactory compliance with prison rules, however, he may receive a small adjustment, or no adjustment at all.[81] Once this credit has been given by the Bureau of Prisons, it cannot be withdrawn. Nor may credit that has been denied later be granted. The prisoner, the public, and the corrections officials will be certain at all times how long the prison term will be, and of the consequences of causing institutional discipline problems.

The Parole Commission will have no jurisdiction over offenders sentenced under the guidelines sentencing system.[82] The Committee believes that, in a guidelines sentencing system, no useful purpose will be served by continuing the Commission. Prison sentences imposed will represent the actual time to be served and the prisoners and the public will know when offenders will be released from prison. Prisoners' morale will probably improve when the uncertainties about release dates are removed.[83] Public respect for the law will grow when the public knows that the judicially-imposed sentence announced in a particular case represents the real sentence, rather than one subject to constant adjustment by the Parole Commission.

The other purposes served in current law by the parole release mechanism will also be better achieved. First, as already discussed, the sentencing guidelines system is better able than the parole system to achieve fairness and certainty in sentencing.

Second, the bill requires that the judge decide, based on factors known at the time of sentencing, whether a defendant who is sentenced to a term of imprisonment will need post-release supervision and what the conditions of that release should be.[84] Under current law, a prisoner is placed on parole supervision if he is released more than 180 days before expiration of his sentence.[85] This does not assure that the prisoner who will need post-release supervision will receive it, nor does it prevent probation system resources from being wasted on supervisory services for releasees who do not need them.

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[80] The annual budget of the Parole Commission is about $7.8 million.

[81] Proposed 18 U.S.C. 3624(b).

[82] Under section 225(b) of the reported bill, the Parole Commission will remain in existence for 5 years after the sentencing [illegible] tenced before that date. At th[illegible] dates for all prisoners still in [illegible] General Accounting Office, fo[illegible] study, based in part on a repo[illegible] ing guidelines system. Congre[illegible] including a determination wh[illegible]

[83] The official report on th[illegible] major cause of the riots. Ne[illegible] Hirsch, *Doing Justice: The Ch*[illegible] of Punishments, at 31, n. 11. See also Subcommittee Criminal Code Hearings, Part XIII, at [illegible]

[84] Proposed 18 U.S.C. 3584, 3583.

Third, because of the increased certainty of release dates, the bill should enhance prison rehabilitation efforts because prison officials will be able to work with prisoners to develop realistic work programs and goals within a set term of imprisonment. As Professor Norval Morris of the University of Chicago Law School has illustrated, parole boards are not able to predict with any degree of certainty which prisoners are likely to be "good" release risks and which are not.[86] Indeed, such determinations seem especially suspect when made on the basis of how a prisoner responds to prison rehabilitative programs.[87]

Fourth, the bill provides better mechanisms than the parole system for dealing with institution discipline problems. A prisoner will continue to receive credit toward his term, or "good time" for satisfactory institutional behavior,[88] but it will not be subject to constant adjustment by prison officials. Nor will an agency such as the Parole Commission be able to supersede the determination of prison officials regarding what effect disciplinary problems should have on the release date. If a prisoner is aware that his behavior will have a direct effect on his release date, he can set a personal goal for early release by demonstrating compliance with prison rules. Thus, prison discipline should improve greatly. It should be noted that prison officials now rely on a number of disciplinary measures, such as changing institutions or privileges, in addition to the current ineffective good time allowances, to effect good institutional behavior.[89]

Finally, under the bill, the Bureau of Prisons is required to assure, to the extent practicable, that the last ten percent of a prison term is spent "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community." [90] The Bureau of Prisons has instituted an effective program in which transition services are made available to many prisoners while they are still serving their sentences. Thus, it is unnecessary to continue the parole system to carry out this purpose. In fact, under the current parole system, fewer than half the persons released after serving terms of imprisonment of more than one year are supervised. Thus, the parole system cannot be relied on for necessary transition services.

The Judicial Conference of the United States, while recommending a determinate sentencing guidelines system, has proposed legislation (S. 1182) that would retain the United States Parole Commission to continue some of its functions under current law. Under the

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[85] 18 U.S.C. 4164 and 4205.

[86] See N. Morris, The Future of Imprisonment, pp. 31-34 (1974).

[87] [illegible] the Parole Commission, in determining [illegible] has recently placed increased emphasis on "superior program achievement." See 28 C.F.R. § 2.60.

[88] Proposed 18 U.S.C. 3624(b).

[89] See Subcommittee Criminal Code Hearings, Part XIII, at 9212-13.

[90] Proposed 18 U.S.C. 3624(c).

Judicial Conference proposal, the sentencing guidelines, in recommending a term of imprisonment, would recommend both a date for release on parole of a prisoner who substantially complies with prison rules and a maximum term of imprisonment that would be served. The sentencing judge, after considering the sentencing guidelines, would then specify both the parole release date, assuming good institutional behavior, and the maximum term that could be served by a particular prisoner if he did not meet that requirement. A prisoner would be released on his parole eligibility date unless the Parole Commission found at a hearing held shortly before that date that the prisoner had not "substantially observed the rules of the institution * * * to which he has been confined." If such a finding were made, the Parole Commission would set a release date, pursuant to its own guidelines, at a later date within the maximum sentence. The Parole Commission would also be responsible for setting release conditions for parolees, for revoking parole if the conditions were violated, and for re-paroling a prisoner whose parole was revoked.

The Committee has given this suggestion careful consideration but has rejected it on three grounds. First, the Parole Commission is a costly and cumbersome institution; and it is unlikely that the cost or complexity of the Commission would be reduced substantially if its function of setting release dates were eliminated. It would still have to hold at least one hearing in every case in which a defendant was sentenced to a term of imprisonment of more than one year; the purpose of the hearing would simply be changed. Second, the Judicial Conference proposal would not eliminate a significant problem with the current law; that is, a prisoner who needs post-release supervision may not receive it because he has served his entire term of imprisonment, while a prisoner who does not require supervision might be placed on parole merely because part of his term remains unserved when he is released.[91]

Third, the Judicial Conference proposal retains vestiges of the rehabilitation theory upon which current law is exclusively based. Under the proposal, prison release remains conditional until the defendant serves his full term of imprisonment in a combination of imprisonment and parole release. Only if the offender demonstrates that he is fully "rehabilitated" by complying with the terms of release will he have completed his prison term. Under Title II as reported, a prisoner has completed his prison term when released even if he is released to serve a term of supervised release. If he commits a technical violation of his release conditions, those conditions can be made more severe. If he commits a serious violation, he can, depending on the circumstances of the case, be punished for contempt of court or be held pending trial if the violation is a new criminal offense.[92]

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[91] Under the Judicial Conference proposal, the sentencing guidelines (and a sentence imposed [illegible] the category of prisoners most likely to need it.

[92] Proposed 18 U.S.C. 3583 (e)(2) or (3).

4. Availability of sentencing options

The comprehensive sentencing provisions of the bill provide a full range of sentencing options. The Sentencing Commission in promulgating guidelines and the sentencing judge in imposing sentence may fashion a sentence that suits the characteristics of each offense and offender.

As noted earlier, the only type of sentence for which current law provides a full range of options is the term of imprisonment. This probably results in too much reliance on terms of imprisonment when other types of sentences would serve the purpose of sentencing equally well without the degree of restriction on liberty that results from imprisonment.[93]

Under the bill, maximum fines have been substantially increased from current law.[94] This will permit the imposition of a substantial fine in lieu of part or all of a prison term in appropriate cases.

The bill treats probation as a form of sentence with conditions[95] rather than as a deferral of imposition or execution of a sentence, and it requires that in felony cases it be accompanied by a fine, an order to pay restitution, or an order to engage in community service.[96] The Committee encourages the fashioning of conditions of probation in order to make probation a useful alternative to a term of imprisonment. A full range of possible probation conditions is suggested in the bill.[97] For example, the bill permits nights or weekends to be spent in a penal or correctional facility as a condition of probation. It continues the ability to require that the defendant reside at, or participate in a program of, a community correctional facility.

The bill adds a new sanction that may be imposed in addition to a term of probation, imprisonment, or a fine. It permits the judge to order that a defendant convicted of an offense of fraud or other intentionally deceptive practices give reasonable notice and explanation of the conviction to the victims of the offense so that they may seek appropriate civil redress.[98] In addition, it carries forward the newly created remedy of an order of restitution that permits the judge to order a defendant found guilty of an offense that caused bodily injury or property damage, destruction, or loss to make restitution to the victim.[99]

5. Consistency of purpose

For the first time, Federal law will assure that the Federal criminal justice system will adhere to a consistent sentencing philosophy. Further, each participant in the system will know what purpose is to be achieved by the sentence in each particular case.

As previously noted, the bill itself sets forth the four basic purposes of criminal sanctions.[100] It requires the Sentencing Commission to consider these purposes in developing sentencing guidelines and policy statements.[101] It further requires sentencing judges to consider them in imposing sentence.[102]

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[93] See, e.g., Remarks by Attorney General William French Smith, Vanderbilt University [illegible]

[94] [illegible]

[95] [illegible]

[96] [illegible]

[97] [illegible]

[98] [illegible]

[99] [illegible]

[100] [illegible]

The bill requires the sentencing judge to announce how the guidelines apply to each defendant [103] and to give his reasons for the sentence imposed.[104] The judge is also required to give the reason for imposing sentence at a particular point within the guidelines or, if the sentence is outside the guidelines, specific reasons for imposing a sentence of a different kind or length than recommended in the guidelines.[105]

The statement of reasons can be used by each participant in the Federal criminal justice system charged with reviewing or implementing a sentence. It will assist the appellate courts in reviewing the reasonableness of a sentence outside the guidelines, and in determining whether a sentence within the guidelines is the result of correct or incorrect application of the guidelines. The statement of reasons can be used by probation or prison officials, working in conjunction with the defendant, in achieving the goals sought by the sentencing judge.

Finally, the abolition of the Parole Commission will eliminate its second-guessing of the judge's sentencing, and will obviate the need for the judge to anticipate how the Parole Commission may alter the sentence he imposed.

6. Miscellaneous sentencing issues

a. Introduction

Since Federal sentencing reform legislation was first introduced more than six years ago, a number of concerns have been expressed. These include, in particular, concerns that the guideline sentences may be too high or too low; that they may result in prison overcrowding; that the guidelines system may shift discretion from the judges to the prosecutors; that the Sentencing Commission may have too much power; and that the authority for the Department of Justice to appeal a sentence below the guidelines is inappropriate

Since the time these sentencing proposals were first introduced in 1977 the Committee has suspected that these concerns were not well-founded. However, since 1977 a growing number of States and localities have implemented sentencing reform legislation or voluntary guidelines systems and preliminary indications based on their experiences support the workability of a sentencing guidelines system and, in particular, the advantages of the system proposed by the Committee as compared to other forms of sentencing reform.[106]

Following is a discussion of these issues and, where relevant, a description of State experience in the area.

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[101] Proposed 28 U.S.C. 991(b) and 994 (a) and (f).

[102] Proposed 18 U.S.C. 3553(a)(2).

[103] Proposed Rule 32(a)(1), F.R. Crim. P.

[104] Proposed 18 U.S.C. 3553(c).

[105] *Ibid.*

[106] See generally, National Academy of Sciences Report, *supra* note 45, which describes State and local sentencing reform efforts and discusses available research on the implementation of those reform efforts.

b. Guidelines sentences and impact on the criminal justice system

Some critics have expressed concern that sentences under the guidelines will be either too low to protect the public or so high that they will result in prison overcrowding.

In order to avoid these problems, the bill directs the Sentencing Commission both to ascertain current sentencing practice and to be mindful of the capacity of the prisons and other parts of the criminal justice system.[107] It should be made clear that these provisions are not designed to require the Sentencing Commission to recommend a continuation of current sentencing practices; they are included to assure that the Commission studies current practice sufficiently to avoid *inadvertent* changes in that practice. As the bill notes, "in many cases current sentences do not accurately reflect the seriousness of the offense." [108] The Committee is of the view that the Sentencing Commission will probably find, for example, that the sentences for some violent offenders are too low and that the sentences for some property offenders are too high to serve the purposes of sentencing. By developing complete information on current practices, the Sentencing Commission will be able, if necessary, to change those practices with a full awareness of their potential impact on the criminal justice system.

The bill also requires that the initial sentencing guidelines be submitted to the Congress six months before they go into effect, during which time the General Accounting Office is required to study the guidelines and compare their potential impact with the existing sentencing and parole system.[109] If, based on this information, the Congress concludes that the guidelines reflect sentences that are either too high or too low from either a practical or a philosophical standpoint, it can reject them by enacting the appropriate legislation.[110]

Several jurisdictions have recently adopted sentencing reform legislation or other sentencing reform measures. Only one State, Minnesota,[111] is operating under a determinate sentencing system with sentencing guidelines. One other State, Washington,[112] has enacted legislation to create a determinate sentencing guidelines system; Washington's guidelines are under development and are scheduled to go into effect in the middle of 1984. While several other States have enacted sentencing reform legislation in recent years, none of the other State sentencing systems are similar to the proposed Federal sentencing system in all important respects. The

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[107] Proposed 28 U.S.C. 994(g) and (*l*).

[108] Proposed 28 U.S.C. 994(*l*).

[109] Section 225(a)(1)(B)(ii) of S. 1762.

[110] Proposed 28 U.S.C. 994(o).

[111] Minnesota Stat. Ann. §§ 244.04, 244.05, 244.08, 244.09, 244.10 (West Supp. 1983).

[112] Wash. Rev. Code Ann. §§ 9.94A.010 to 9.94A.260 (1983–1984 Supp.). (Unlike the Federal proposal and the Minnesota guidelines, the Washington guidelines are to be enacted by the legislature (see Wash. Rev. Code Ann. § 9.94A.070 (1983–1984 Supp.)).)

Pennsylvania,[113] California,[114] Illinois,[115] and Indiana [116] statutes, among others, create a determinate sentencing system but create a system of specific legislated sentences rather than a more flexible sentencing guidelines system. The Maine statute [117] abolishes parole but does not create either a sentencing guidelines system or legislated sentences. South Carolina has established a sentencing commission that is in the process of developing guidelines in the context of an indeterminate sentencing system.[118] Several States, including Maryland, Massachusetts, and New Jersey,[119] and numerous local courts have adopted such guidelines.[120]

The National Academy of Sciences has recently published an extensive study and evaluation of all the research that has been done on State and local sentencing reform efforts.[121] That study concluded that, in every respect studied, the Minnesota sentencing reform had been more successful than any other State or local reform effort in achieving its goals of reducing unwarranted sentencing disparity, increasing emphasis on punishment for violent offenders, and avoiding unintended burdens on the prison system.[122] This finding is especially important to the consideration of this bill because of the substantial similarity between the Minnesota legislation and this Federal sentencing reform measure.

The National Academy of Sciences study concluded that the Minnesota sentencing guidelines system was more successful in changing sentencing behavior to reduce unwarranted sentencing disparities for three reasons. First, the sentencing guidelines were required by legislation rather than adopted voluntarily by the courts. Second, the guidelines prescribed what sentencing behavior ought to be rather than merely describing past sentencing practices. And third, the Minnesota statute included a mechanism—availability of appellate review of all sentences outside the guidelines—to assure judicial compliance with the guidelines. The study also found that Minnesota was able to create a model of its criminal sentencing system that permitted it to test the impact of any given set of sentencing guidelines on its prison system, thus enabling it to fashion guidelines that avoided any unintended impact on the prison system.

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[113] 42 Pa. Cons. Stat. Ann. §§ 2151-2155, 2155 note, 9721, 9721 note (Purdon Supp. 1982-83). Pennsylvania law provides for rejection of sentencing guidelines by the General Assembly, *Id.* § 2155(b). The General Assembly adopted sentencing guidelines by statute in 1982, *Id.* § 9721 note. Both the Board of Probation and Parole and the Commission on Sentencing are scheduled to be abolished December 31, 1985, Pa. Cons. Stat. Ann. § 1795.6(b) (Purdon Supp. 1982-1983).

[114] Cal. Penal Code § 1170 (West Supp. 1983).

[115] Ill. Ann. Stat. ch. 38, §§ 1005-4-1, 1005-4-2, 1005-8-1, 1005-8-3, 1005-8-7, 1005-10-1, 1005-10-2 (Smith-Hurd 1982).

[116] See Ind. Code Ann. §§ 35-50-1A-7, 35-50-2-2(b), 35-50-2-3 to 35-50-3-4 (Burns 1979 and Burns Supp. 1982).

[117] Me. Rev. Stat. Ann. tit. 17-A, § 1252 (West Supp. 1982).

[118] § 24-27-10 et seq. (S.C. Code of Laws 1976).

[119] Administrative Office of the Courts, *Maryland Sentencing Guidelines Manual* (Rev. ed. October 1982); State of New Jersey, Administrative Office of the Courts, Sentencing Guidelines Project, *Report of the Sentencing Guidelines Project to the Administrative Director of the Courts.*

[120] See National Academy of Sciences Report, *supra* note 45 at 2, 61.

[121] National Academy of Sciences Report, *supra* note 45.

[122] *Id.* at 27, 29-31, 192-93, 253. See also Minnesota Sentencing Guidelines Commission, *Preliminary Report on the Development and Impact of the Minnesota Sentencing Guidelines (1982).*

c. Sentencing guidelines and prosecutorial discretion

Some critics expressed the concern that a sentencing guidelines system will simply shift discretion from sentencing judges to prosecutors.[123] The concern is that the prosecutor will use the plea bargaining process to circumvent the guidelines recommendation if he doesn't agree with the guidelines recommendation.

The bill contains a provision designed to avoid this possibility. Under proposed 28 U.S.C. 994(a)(2)(D), the Sentencing Commission is directed to issue policy statements for consideration by Federal judges in deciding whether to accept a plea agreement. This guidance will assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines. Professor Stephen J. Schulhofer, who initially raised the question of whether sentencing guidelines would shift too much discretion to prosecutors, has stated that judicial review of plea bargaining under such policy statements should alleviate any potential problem in this area.[124]

d. Makeup and authority of the Sentencing Commission

Title II as reported creates a United States Sentencing Commission whose duty is to promulgate sentencing guidelines and policy statements. The Sentencing Commission would be in the judicial branch and would consist of seven members appointed by the President with the advice and consent of the Senate. Two of the members would be active Federal judges.[125] The President would consult representatives of judges, prosecutors, defense attorneys, and others for recommendations on who should be members of the Commission.

The Chairman of the Commission would hold a full-time position and would be paid at the annual rate of judges of the United States Courts of Appeals. The other six positions would also be full-time until the end of the first six years that the guidelines are in effect. These positions would then become part-time. Individuals occupying full-time positions would be compensated at the rate of the judges of the United States Courts of Appeals. Part-time members would receive the daily rate at which United States Courts of Appeals judges are paid.[126]

The Judicial Conference of the United States, concerned that the Sentencing Commission would have too much power and would duplicate efforts of the staffs of the Federal Judicial Center and the Administrative Office of the United States Courts, has proposed alternative legislation (S. 1182). That bill specifies that sentencing guidelines would be issued by the Judicial Conference after considering guidelines recommended by a Committee on Sentencing of the Judicial Conference. The Committee on Sentencing would consist of seven part-time members selected by the Judicial Conference. Four of the members would be active Federal judges, while three other members would be persons who had never been judges and one of them would be a non-lawyer. Non-government members would be paid at the daily rate for GS–18 Federal employees. The proposed legislation contains no language concerning the staff of the Committee, but the supporting materials indicate that the staff would be provided by the Federal Judicial Center and the Administrative Office of the United States Courts.

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[123] See, e.g., Schulhofer, *Prosecutorial Discretion and Federal Sentencing Reform* 53-72 (1979); Criminal Code Hearings, part XIV, at 10101 (testimony of John Cleary).

[124] House Hearings, *supra* note 74 at 4621-24 (1979) (letter of Professor Stephen J. Schulhofer).

[125] 28 U.S.C. 991(a).

[126] 28 U.S.C. 992(c).

The Committee has given careful consideration to these recommendations of the Judicial Conference but has concluded that the provisions for a Sentencing Commission that are contained in S. 1762 are preferable for a number of reasons.

First, the reported bill requires all three branches of government, rather than only the judicial branch, to participate in the selection of members of the Sentencing Commission. This permits legislative branch participation in the selection of members of the body to which Congress will be delegating some of its authority to set sentencing policy. Presidential appointment of the members assures high visibility of the Commission, which the Committee thinks is important to the Commission's role in guiding this extensive change in Federal sentencing policy. Finally, the bill does assure the judiciary a role in the selection of the members and does place the Commission in the judicial branch.

Second, the Judicial Conference bill would preclude membership on the guidelines drafting agency of former or senior Federal judges and of non-Federal judges. Since several judges in these categories have been among the most articulate spokesmen for sentencing reform, the Committee thinks it is undesirable to preclude them from consideration.

Third, the Committee thinks that the guidelines drafting agency should have full-time members at least until the initial guidelines are in place during its first few years. While the first set of guidelines is being drafted and implemented, the Commission members will be very busy studying current sentencing practices, determining the extent to which these practices should be changed or followed, and determining whether they need fine-tuning after they are implemented. In addition, because of the importance of the work of the Commission, that work should not be subordinated to other work of the members of the Commission.

Finally, the Committee strongly believes that the Sentencing Commission should have its own staff. Of course, that staff should coordinate with and draw on the expertise of the staffs of the Federal Judicial Center and the Administrative Office of the United States Courts, and the bill requires this coordination.[127] These staffs have highly competent personnel who have engaged in sentencing research, published sentencing data, and begun extensive data collection for assistance in implementing sentencing guidelines. It would be a mistake for the Sentencing Commission to fail to draw on these resources. However, the staffs of the Federal Judicial Center and the Administrative Office of the United States Courts have numerous other responsibilities; the Committee believes that it is important that there be a staff assigned only to sentencing reform responsibilities without conflicting demands on their time.

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[127] Proposed 28 U.S.C. 995(b).

e. Government appeal of sentence

Another frequent criticism leveled at the bill is that it should not provide the government with the power to appeal a sentence. If the reforms are to be effective in reducing unwarranted sentencing disparity and achieving overall fairness, however, it is essential that there be a mechanism to appeal on behalf of the public those sentences which fall below the applicable guidelines.[128] If the defendant alone can appeal, there will be no effective opportunity for the reviewing courts to correct an injustice arising from a sentence that is patently too lenient. Appellate review for the defendant alone would not be an effective weapon to fight disparity, since the appellate court could reduce excessive sentences but not raise inadequate ones. The effort to achieve greater uniformity, therefore, might unintentionally result in a gradual scaling down of sentences to the level of the more lenient ones.

CONCLUSION

The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

The bill, as reported, meets the critical challenge of sentencing reform. The bill's sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders. The Committee believes that the bill represents a major breakthrough in this area.

Section-by-Section Analysis

Section 201 of the bill states that this title may be cited as the "Sentencing Reform Act of 1983".

Section 202(a)(1) redesignates a number of sections of title 18, United States Code, with new section numbers in order to preserve them while making room for the new sentencing provisions enacted by section 202(a)(2). Among the sections that are redesignated are 18 U.S.C. 3579 and 3580, the restitution provisions enacted by the Victim and Witness Protection Act of 1982, which are redesignated as 18 U.S.C. 3663 and 3664. All the redesignated provisions become part of new chapter 232 of title 18, United States Code, under section 202(a)(4) of the bill.

Section 202(a)(2) repeals the provisions of current chapters 227, 229, and 231 of title 18 that are not redesignated by section 202(a)(1) and replaces them with new chapters 227 and 229 of title 18. The repealed provisions are discussed below where pertinent.

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[128] The Committee rejects the argument that government appeal would be unconsitutional under the double jeopardy provision of the Constitution. See discussion with respect proposed 18 U.S.C. 3742 (Review of a sentence).

CHAPTER 227—SENTENCES

Proposed chapter 227 of title 18, United States Code, describes the types of sentences that can be imposed on Federal criminal offenders. Subchapter A contains general provisions relating to sentences for Federal offenses. Subchapters B, C, and D describe the sentences to a term of probation, to pay a fine, and to a term of imprisonment, respectively.

SUBCHAPTER A—GENERAL PROVISIONS

(Proposed 18 U.S.C. 3551–3559)

This subchapter contains general provisions relating to the types of sentences that can be imposed on individuals and on organizations, and to the considerations that should go into the determination of an appropriate sentence. Section 3551 lists the types of sentences that may be imposed upon a defendant who has been found guilty of an offense. Section 3552 contains the requirements for presentence investigations and reports. Section 3553 lists the factors to be considered by a sentencing judge in imposing sentence and sets forth the requirement that the judge state reasons for a particular sentence. Sections 3554 through 3556 describe the collateral sentences of an order of criminal forfeiture, an order of notice to victims of a fraudulent offense, and an order of restitution. Sections 3557 and 3558 contain cross-references to other provisions of title 18 and the Federal Rules of Appellate Procedure relating to appellate review and implementation of sentences. Section 3559 specifies how the classification system created in section 3581(b) applies to offenses that are not specifically graded by letter grade.

SECTION 3551. AUTHORIZED SENTENCES

1. In general

Section 3551 outlines the authorized sentences for defendants found guilty of Federal offenses. It requires that each Federal offender be sentenced in accord with the provisions of the subchapter in order to achieve the general purposes of sentencing. It lists separately the kinds of sentences that may be imposed on individuals and on organizations and the combinations of kinds of sentences that may be imposed.

2. Present Federal law

Section 3551 has no direct counterpart in current law. Generally each statute in current law that defines a criminal offense specifies the maximum term of imprisonment or the maximum fine, or both, that may be imposed upon a defendant found guilty of violating the statute. A few statutes also specify minimum sentences that must be imposed.[129] Current law also rarely distinguishes between individuals and organizations for sentencing purposes. Thus, present law fails to recognize the usual differences in the financial resources of these two categories of defendants and fails to take into account the greater financial harm to victims and the greater financial gain to the criminal that characterize offenses typically perpetrated by organizations.

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[129] Most statutes that specify minimum sentences do not create mandatory minimum sentences of confinement, since they do not preclude the suspension of sentence, or the placement of the defendant on probation or parole. Compare the apparent mandatory minimum sentence applicable to a first offense under 18 U.S.C. 924(c) with the mandatory minimum sentence applicable to a second offense under the same provision.

Nor does current law adduce the types of sentences that may be imposed on a particular type of defendant. The present statutes contain only general provisions for suspending the imposition or execution of most sentences and for placing defendants on probation rather than imposing or executing their sentences.[130]

Finally, current Federal law contains no general statement of the need for a sentence to carry out a particular purpose. It does, however, contain several very specialized sentencing statutes that apply only to certain categories of offenders—youth offenders,[131] young adult offenders,[132] certain drug users and addicts,[133] dangerous special offenders,[134] and dangerous special drug offenders [135]—and that tie their provisions to congressional statements that the purpose of the sentence is treatment,[136] treatment and supervision,[137] or incapacitation.[138]

3. Provisions of the bill, as reported

Subsection (a) provides that a defendant found guilty of any Federal offense shall be sentenced in accordance with the provisions of the chapter "so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case." The paragraphs referred to set forth the basic purposes of sentencing—deterrence,[139] incapacitation, just punishment, and rehabilitation. This part of section 3551 is designed to focus the sentencing process upon the objectives to be achieved by the Federal criminal justice system and to encourage the employment of sentencing options, such as probation, fines, imprisonment, or combinations thereof, in a fashion tailored to achieve these multiple objectives.

While the bill, as reported, contains a congressional statement of four purposes of sentencing, the Committee has not favored one purpose of sentencing over another except where the sentence involves a term of imprisonment.[140] While some of those who have commented on the bill prefer that one purpose or another be favored over the others or, indeed, that some of the listed purposes be deleted from the bill altogether,[141] the Committee believes that each of the four stated purposes should be considered in imposing sentence in a particular case. The Committee also recognizes that one purpose may have more bearing on the imposition of sentence in a particular case than another purpose has. For example, the purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he participate in a particular course of study, while the purposes of just punishment and incapacitation may be important considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment.

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[130] 18 U.S.C. 3651.

[131] Federal Youth Corrections Act, chapter 402 of title 18, United States Code.

[132] 18 U.S.C. 4216.

[133] 18 U.S.C. 4251 *et seq.*

[134] 18 U.S.C. 3575 *et seq.*

[135] 21 U.S.C. 849.

[136] E.g., 18 U.S.C. 4216 (young adult offenders) and 4253 (certain drug users and addicts).

[137] 18 U.S.C. 5010 (b) and (c).

[138] See P.L. 91-452, 84 Stat. 922-23 (Organized Crime Control Act) (Oct. 15, 1970); 18 U.S.C. 3775-78; S. Rept. No. 91-617 at 83 (1969); see also 21 U.S.C. 849(f).

[139] The subject of general deterrence as a basis for imprisonment was discussed in *United States* v. *Foss*, 501 F. 2d 522 (1st Cir. 1974).

[140] Section 3582(a) provides, however, in light of current knowledge, that in determining whether to impose a sentence of imprisonment and in determining the length of a term of imprisonment, the sentencing judge should recognize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Proposed section 994(k) of title 28, as enacted by section 207(a) of the bill, provides that the sentencing guidelines should reflect the "inappropriateness" of using rehabilitation or availability of corrections programs as the basis for imposing a term of imprisonment.

Subsection (b) of section 3551 specifies that an individual offender must either be placed on probation, fined, or imprisoned as provided in the subchapters governing the imposition of such sentences. It requires the imposition of at least one of such sentences.[142] It further states that a fine or any of the sanctions authorized by section 3554, 3555, or 3556 may be imposed in addition to any other sentence.

Subsection (b) treats a term of probation as a type of sentence, rather than as an alternative to imposition or execution of a sentence as in current law.[143] Subsection (b) also eliminates the split sentence in which a term of imprisonment is followed by a term of probation.[144]

Subsection (c) requires that an organization that is convicted of a Federal offense be sentenced to a term of probation [145] or to pay a fine, or both. At least one of such sentences must be imposed. In addition, an organization may, in an appropriate case, be made subject to an order of criminal forfeiture, an order of notice to victims, or an order of restitution.

S. 1, as introduced in the 93rd Congress, provided, as an equivalent to a term of imprisonment for an individual offender, that an organization could be barred from its "right to affect interstate or foreign commerce" for a period up to the maximum length of time that an individual convicted of an offense of the same seriousness could be sentenced to prison.[146] Because the Committee was concerned that such a provision might too readily be used in an inappropriate case, this provision was deleted in the reported version of S. 1437 in the 95th Congress.[147] Instead, S. 1437 took the approach that, in an appropriate case, an organization could be barred, as a condition of probation, from engaging in a particular business or could be ordered to engage in such a business only under stated circumstances.[148] Such a condition of probation would, of course, apply only for the duration of the term of probation.

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[141] See, e.g., Crime Control Act Hearings (testimony on May 23, 1983); Subcommittee Criminal Code Hearings, Part XIII, at 8582, 8590, 8874, 8883; Criminal Code Hearings, Part XVI, at 11957 and 11962.

[142] The National Commission's recommendation that there be an alternative sentence of "unconditional discharge" (Final Report §§ 3301, 3105) has not been adopted by the Committee. It seems to the Committee that it is both illogical and unwise to convict a defendant of a criminal offense without imposing any sanction for that misconduct. In a compelling case, a similar result can be achieved by imposing a sentence to a term of probation without supervision. See sections 2101(b) and 2103.

[143] 18 U.S.C. 3651. See discussion of subchapter B of this chapter.

[144] But see proposed 18 U.S.C. 3563(b)(11) and 3583.

[145] A corporation may be placed on probation under current law. See, e.g., *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972); *United States* v. *J.C. Ehrlich Co., Inc.* 372 F. Supp. 768 (D. Md. 1974).

[146] Section 1-4A1(c)(1).

[147] See S. Rept. No. 95-605, at 887 (1977).

Business groups, however, continued to express concern that the probation condition prohibiting an organization from engaging in a particular business might encourage misapplication to a business that had committed a regulatory offense but that was otherwise a legitimate business. While the intent of the Committee had been that the condition barring the conducting of a particular business shall be used only for an organization that conducted business in a flagrantly illegal manner, the Committee understands the concerns of business that the condition might encourage misapplication to the economic detriment of a legitimate enterprise. The Committee also believes that the situation in which an organization operates in a totally illegal manner is relatively unusual, occurring most frequently in cases where a business exists only as a front for those individuals who use it for their own fraudulent purposes. Accordingly, this condition of probation has been further modified by the Committee. The bill now provides that the condition prohibiting a defendant from engaging in a particular business shall apply only to an individual offender. In the rare case in which an organization operates in a generally illegal manner, the sentencing judge can rely on section 3563(b)(20), the general authority to set appropriate conditions of probation for the organization, and under section 3563(b)(6) can also bar an individual offender, such as an officer or even sole proprietor of a fraudulent business, from engaging in a particular business.

The Committee believes that section 3551 provides the basis for achieving considerable flexibility in the formulation of an appropriate sentence for each particular case. The combination of this section, the more detailed description of sentences that appears in the following subchapters, the purposes of sentencing set forth in section 3553(a)(2), and the provisions for sentencing guidance to the judges set forth in section 3553 of this title and in proposed chapter 58 of title 28,[149] should permit enough flexibility to individualize sentences according to the characteristics of the offense and the offender, while at the same time resulting in the imposition of sentences that treat offenders consistently and fairly.

SECTION 3552. PRESENTENCE REPORTS

1. In general

Section 3552 requires the preparation of a presentence report by a probation officer in accord with the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, permits the court to request a presentence report by the Bureau of Prisons or by psychiatric examiners in appropriate cases, and requires the court to assure that these presentence reports are made available in a timely manner to the defendant and his counsel and to the attorney for the government in accord with, and to the extent permitted by, the provisions of Rule 32(c).

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[148] See S. 1437, 95th Cong., 1st Sess., proposed 18 U.S.C. 2103(b)(6).

[149] See section 207 of the reported bill.

2. *Present Federal law*

The basic provisions dealing with presentence reports are currently found in Rule 32(c) of the Federal Rules of Criminal Procedure. Subdivision (c)(1) of Rule 32 requires that a presentence report be made unless (1) the defendant, with the permission of the court, waives it, or (2) the court finds that the record contains sufficient information and explains this finding on the record. The probation service is given wide discretion in determining the information to be included in the report.[150] The rule specifically mentions the prior criminal record of the defendant, the circumstances of the offense and those affecting the defendant's behavior, and information concerning restitution needs.[151]

The form used for the presentence reports is recommended by the Probation Division of the Administrative Office of the United States Courts.[152] Since July 1, 1978, as a result of those recommendations, Federal judges have received information in the presentence report regarding the parole guideline that the probation officer believes the Parole Commission will apply to the defendant if he is sentenced to a term of imprisonment,[153] and information concerning sentencing practices for the offense. This information shows the types and ranges of sentences imposed nationwide and in the judge's district for the type of offense (such as drug offenses) and shows the average number of months of imprisonment or probation those offenders received. The information does not include offense or offender characteristics, but the Administrative Office of the United States Courts is expanding its data collection in order to provide more detailed information. The judges also have available tc them the *Sentences Imposed Chart* which shows all the sentences imposed in Federal court under each provision of Federal criminal law.

18 U.S.C. 4205(c) provides that the district court may commit a convicted offender to the care of the Bureau of Prisons for a more detailed study and analysis. The commitment is deemed to be for the maximum term of imprisonment prescribed by law. The results of the study must be reported to the court within three months, unless the court grants additional time, not to exceed three months, for further study. The court is then required to place the defendant on probation, affirm the maximum sentence already imposed, or reduce the sentence. Under 18 U.S.C. 4205(d), the report may include information "regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be pertinent." The provision does not prescribe who should conduct a mental health examination.

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[150] *United States v. Tucker*, 404 U.S. 443 (1972).

[151] Fed. R. Crim. P. 32(c)(2), as amended by section 3 of the Victim and Witness Protection Act of 1982, 96 Stat. 1248, 1249. See S. Rept. No. 97-532 at 11-14 (1982).

[152] The Presentence Investigation Report, Division of Probation, Administrative Office of the United States Courts (1976).

[153] The determination of the applicable guideline made by the probation officer is, of course, not binding on the Parole Commission, which can, and frequently does, determine that a different guideline applies.

3. Provisions of the bill, as reported

Section 3552 amends current law to assure that presentence reports contain the information necessary to make an appropriate sentencing decision in the new sentencing guidelines system. Under subsection (a), presentence reports are required to be prepared by probation officers pursuant to the provisions of Rule 32. Rule 32(c) is amended by the bill to require the preparation of a presentence report unless the judge finds that he has sufficient information "to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553". The defendant would not be able to waive the presentence report, as he can under current law, since it is important that the sentencing judge assure himself that he has sufficient information from which to determine the applicable sentencing guideline.

Pursuant to the recommendations of the Judicial Conference Committee on the Administration of the Probation System,[154] the Committee deleted from proposed 18 U.S.C. 2002 in S. 1437 as introduced in the 95th Congress, a predecessor to proposed 18 U.S.C. 3552 in the reported bill, language that would have required conviction of a defendant before the presentence investigation could be conducted. Rule 32 of the Federal Rules of Criminal Procedure was amended in 1974 to authorize the making of a presentence investigation prior to conviction, provided only that the report's contents may not be disclosed to anyone until conviction, except that a judge may inspect the presentence report with the written consent of the defendant. This section is intended to continue present law in this regard.

In its testimony in the 97th Congress, the Judicial Conference expressed concern that the provisions of subsection (a) as introduced could be construed to require that the probation officer who prepares the presentence investigation and report must be an officer of the particular court sentencing the defendant.[155] In accordance with a suggestion by the Conference, subsection (a) has been amended by the Committee to make clear that any probation officer may make the presentence investigation and report. This assures that, for example, if a defendant has lived in more than one district in which the investigation should be conducted, it is unnecessary for a probation officer of the sentencing court to travel to a distant district to complete the investigation; he can instead call on a probation officer of the distant district to conduct all or part of the investigation.

To assist the court in determining into what guideline category a case fits, and whether special mitigating or aggravating factors warrant the imposition of a sentence outside that guideline, the existing provisions of Rule 32(c)(2) (A) and (B) have been incorporated in subdivision (c)(2)(A) of the Rule and are amended by section 205(a)(5) of the bill, as reported, to refer generally to "the history and characteristics of the defendant" in conformity with the requirement of section 3553 that the judge consider these matters in imposing sentence. The Rule has been further amended to require that there be included in a presentence report:

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[154] Subcommittee Criminal Code Hearings, Part XIII, at 8940.

[155] Criminal Code Hearings, Part XVI, at 11021.

> the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances [as well as] any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2). * * *

The provisions of existing Rule 32(c)(2) (C) and (D) are carried forward unchanged as Rule 32(c)(2) (D) and (E).

Subsection (b) of section 3552 partially incorporates and revises the provisions of 18 U.S.C. 4205(c). The bill provides that if the court desires more information about a convicted defendant, either before or after receiving the presentence report and any report concerning the defendant's mental condition, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources locally available to perform the study.

The provision that presentence studies be conducted locally where possible was added to maximize savings of time and money by reducing the need to transport Federal prisoners to distant Federal installations within the system and to avoid the practice of giving certain defendants a "taste of jail" under the pretense of sending them to a prison facility for the purpose of a pre-sentence examination. The bill amends current law by reducing the maximum period for the study from six months to 120 days (60 days plus a maximum 60-day extension) in order to advance the time for final sentencing while still allowing an adequate period for study. The Committee has amended the bill to specifically require that the court order for a study specify the information sought by the court. This will assure that those preparing the report will focus their attention on the issues of most interest to the court. The requirement is also consistent with the shortened period for preparation of the report. The preparers of the report are required to conduct a complete study of matters specified by the court and of any other matters they believe are pertinent to the factors that the judge must consider pursuant to section 3553(a) before imposing sentence. Before expiration of the study period or any extension, the study must be reported to the court. The report may contain any information that the Bureau believes to be pertinent to the sentencing decision. The report is required to include the Bureau's recommendations as to the sentencing guidelines and policy statements issued by the Sentencing Commission pursuant to 28 U.S.C.

994(a) that the preparers believe to be applicable to the defendant's case.

Under current law,[156] if a defendant is committed to the custody of the Bureau of Prisons for study prior to sentencing, he is deemed to have been sentenced to the maximum term of imprisonment for his offense. After the study, the judge either affirms that sentence, reduces it, or places the defendant on probation. Under subsection (b), the temporary sentence is expressly labelled for administrative purposes as a provisional sentence, and when the study is completed, the judge will impose a final sentence [157] under the various sentencing alternatives and procedures available under the chapter. Thus, the judge will be making the sentencing decision after all the necessary information has been obtained rather than being required to adjust a sentence that has already been set at the maximum level.

Earlier versions of this provision required the Bureau of Prisons to return the defendant to court following the presentence study. The current bill places this responsibility with the United States Marshals, since no change in this current practice was intended.

Subsection (c) adds a new provision to the law that specifically permits the court to order a presentence examination by a psychiatric examiner concerning the current mental condition of the defendant. The examination would be conducted by a licensed or certified psychiatrist or clinical psychologist designated by the court. The court would have the authority to designate more than one examiner if it found this to be appropriate. The court would be provided with a written report that included the defendant's history and present symptoms, a description of the psychiatric, psychological, and medical tests used and their results, the examiner's findings and prognosis, and any recommendation the examiner may have on how the defendant's mental health should affect his sentence. The examination would be conducted on an outpatient basis unless the defendant was incarcerated pending sentencing, and the judge could request the examination without a motion by prosecution or defense. The judge could order an examination under this section if he thought the defendant's mental condition might affect the sentencing decision. For example, a judge might believe that a convicted defendant's emotional problems should be considered in fashioning an appropriate sentence, and wish to seek the advice of a psychiatric examiner as to whether it would be more appropriate to deal with them in a prison setting or on an outpatient basis following a brief prison term.

A new subsection (d) was added by the Committee in the 96th Congress [158] and amended in this Congress to require that the judge assure that the reports prepared pursuant to this section are disclosed to the defendant, his counsel, and the attorney for the government at least 10 days prior to the date set for sentencing. The 10 day minimum disclosure period may be waived by the defendant.

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[156] 18 U.S.C. 4205(c).

[157] See proposed 18 U.S.C. 3562(b), 3573(c), and 3582(b) concerning degree of finality.

[158] See S. 1722, 96th Cong., 1st Sess., § 101, proposed 18 U.S.C. 2002(d), as reported.

The 10 day minimum for disclosure of the presentence report was added by Senator Kennedy in response to concerns raised by the defense bar that the practice concerning availability of presentence reports varies significantly from district to district, and even within districts. Under a sentencing guidelines system, the presentence report is a critical factor in sentencing. It is extremely important that the report be accurate and complete. Disclosure to both the government and defense counsel well in advance of the hearing will provide an opportunity to correct any deficiencies in the report before the sentencing hearing.

The disclosure is to be made pursuant to the provisions of Rule 32 of the Federal Rules of Criminal Procedure. Thus, disclosure may be in the form of an oral or written summary by the judge of portions of these reports if the judge finds pursuant to Rule 32(c)(3) that the report contains "diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." The Committee believes that timely reports to the parties of the information on which the judge will base his sentencing decision are important to assure that counsel are prepared to address hearing questions relating to the appropriate application of the sentencing guidelines to the defendant. Section 205(a)(6) of the bill amends Rule 32(c)(3)(A) to require disclosure of the information required in the presentence report under Rule 32(c)(2) but to preclude disclosure of the actual sentence recommendation of the probation officer preparing the report.

The provisions of section 3552 thus will provide a court with the resources necessary to acquire adequate information about a convicted offender, including recommendations from the probation system and, if the judge believes it would be helpful, from the Bureau of Prisons or a psychiatric examiner, in order to assure a sound basis in fact for the sentencing decision. The section also assures that the defendant and the government have sufficient information concerning the basis for a sentencing decision to enable them to prepare for the sentencing hearing.

SECTION 3553. IMPOSITION OF A SENTENCE

1. In general

Section 3553 lists the factors that a judge should consider in imposing sentence. It requires the court to impose sentence within the sentencing guidelines unless an aggravating or mitigating circumstance exists that was not adequately considered in the formulation of the guidelines and that should result in a different sentence. It requires that a sentencing judge state reasons for the sentence imposed. Finally, it contains special provisions concerning presentence procedures to be followed if the court is considering imposition of an order of notice pursuant to section 3555.

2. Present Federal law

One of the most glaring defects in current sentencing law is the absence of general legislative guidance concerning the factors to be considered in imposing sentence.[159] This defect is aggravated by the fact that the sentencing judge is not required to state his reasons for imposing a particular sentence.[160] Each judge is left to formulate his own ideas about the factors to be considered in imposing sentence and the effect that each factor should have on the sentence imposed. The result is unwarranted disparities among sentences imposed by different judges.[161]

3. Provisions of the bill, as reported

Subsection (a) sets out the factors a judge is required to consider in selecting the sentence to be imposed in a particular case. This applies to both the appropriate type of sentence (e.g., fine, probation, imprisonment, or a combination thereof) and to the severity of the sentence.

Subsection (a)(1) directs the judge to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." Under this provision, the judge must consider such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstances surrounding the offense. With respect to the history and characteristics of the defendant, the judge must consider such matters as the criminal history of the defendant, as well as the nature and effect of any previous criminal sanctions. All of these considerations and others that the judge believed to be appropriate would assist him in assessing how the sentencing guidelines and policy statements should apply to the defendant. They would also help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing guidelines and that call for the imposition of a sentence outside the applicable guideline.

Subsection (a)(2) requires the judge to consider the four purposes of sentencing before imposing a particular sentence.

The first purpose listed is the need for the sentence "to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense."[162] This purpose—essentially the "just deserts" concept—should be reflected clearly in all sentences; it is another way of saying that the sentence shoud reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense. From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.[163]

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[159] As discussed in connection with section 3551, a number of sentencing statutes applicable to specialized categories of offenders offer limited legislative guidance as to the purposes of a sentence under the specialized statute.

[160] See M. Frankel, *Criminal Sentences, Law Without Order*, 39-49 (1972).

[161] Federal Sentencing Study, *supra* note 18 at III-1 to III-9 (1981); A. Partridge and W. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges* (1974), excerpts in Subcommittee Criminal Code Hearings, Part XI, at 8101.

[162] It has been suggested that one aspect of this purpose of sentencing, "just deserts," should be the sole purpose of sentencing. See Testimony of Andrew von Hirsch, Subcommittee Criminal Code Hearings, Part XIII, at 8977-78 and 8982-83; von Hirsch, *Doing Justice: The Choice of Punishments* (1976). While the Committee obviously believes that a sentence should be "just"; and that the punitive purpose is important, it also believes that it is consistent with that purpose to examine the other purposes of sentencing set forth in section 3553(a)(2) in determining the type and length of sentence to be imposed in a particular case. Rehabilitative considerations may call for a sentence to probation with appropriate conditions where a sentence to a term of imprisonment in other circumstances might be "just"; incapacitation for an extended period of an offender with a serious criminal history might be appropriate where such a long term would not be "just" if the offender's criminal record were not considered.

The second purpose of sentencing is to deter others from committing the offense. This is particularly important in the area of white collar crime. Major white collar criminals often are sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business.

The third purpose is to protect the public from further crimes of the defendant. This is particularly important for those offenders whose criminal histories show repeated serious violations of the law.

The fourth purpose is to provide rehabilitation. During the hearings concerning the revision of the Federal Criminal Code, arguments were advanced that rehabilitation should be eliminated completely as a purpose of sentencing. The Committee has rejected this view. Instead, the Committee has retained rehabilitation and corrections as an appropriate purpose of a sentence,[164] while recognizing, in light of current knowledge, that "imprisonment is not an appropriate means of promoting correction and rehabilitation".[165] It has also required that the Sentencing Commission "insure that the [sentencing] guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." [166]

Rehabilitation is a particularly important consideration in formulating conditions for persons placed on probation. Their participation in such programs as education or vocational training, or in treatment programs such as those for persons with emotional problems or drug or alcohol problems, might be made conditions of probation for rehabilitative purposes.

The Committee does not suggest that efforts to rehabilitate prisoners should be abandoned. Programs within the prison setting should be available and encouraged to enhance the possibility of rehabilitation.[167] Also, as noted previously, the purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case.

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[163] See proposed section 994(b)(1)(B) of title 28, United States Code, as added by section 207(a) of the bill, as reported.

[164] Proposed 18 U.S.C. 3553(a)(2)(D).

[165] Proposed 18 U.S.C. 3582(a).

[166] Proposed 28 U.S.C. 994(k), as added by section 207(a) of the reported bill. It is understood, of course, that if the Commission finds that the primary purpose of sentencing in a particular kind of case should be deterrence or incapacitation, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment if that is determined to be the best means of assuring such deterrence or incapacitation, notwithstanding the fact that such a sentence would not be the best means of providing rehabilitation. A balancing of competing interests is necessary.

[167] Crime Control Act Hearings (statement of the Department of Justice, p. 24); N. Carlson, *Prisons: A Scarce Resource*, 2 (April 15, 1983).

In setting out the four purposes of sentencing, the Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants.[168] The Committee recognizes that a particular purpose of sentencing may play no role in a particular case. The intent of subsection (a)(2) is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.

Subsection (a)(3) requires the judge to consider all sentencing possibilities. The Committee added this provision to the sentencing provisions in the Criminal Code in the 95th Congress. The provision was added in response to two concerns: (1) prison sentences are imposed in cases where equally effective sentences involving less restraint on liberty would serve the purposes of sentencing,[169] and (2) some major offenders, particularly white collar offenders and serious violent crime offenders, frequently do not receive sentences that reflect the seriousness of their offenses. In the former case, for example, it might be possible to fashion a sentence that requires a high fine and weekends in prison for several months instead of a longer period of incarceration. In the case of a major white collar offense, the judge might impose a sentence to a term of imprisonment and a fine proportionate to the gain to the offender instead of simply a low fine that amounted only to a cost of doing business. In the case of a serious violent offense, the judge might impose a higher prison term than is served today in order to punish and incapacitate the criminal.

Subsections (a)(4) and (a)(5) require that the sentencing judge consider the kinds of sentence and the sentencing range applicable to the category of offense committed by the category of offender under the sentencing guidelines issued pursuant to 28 U.S.C. 994(a) and under any applicable policy statements issued by the Sentencing Commission.

The guidelines and policy statements to be applied are those in effect at the time of sentencing. Use of guidelines and policy statements since revised would only create significant administrative difficulties. Moreover, it would be inconsistent with the philosophy embodied in this legislation, that the Sentencing Commission can and should continually revise its guidelines and policies to assure that they are the most sophisticated statements available and will most appropriately carry out the purposes of sentencing. 28 U.S.C. 991(b)(1)(C) and 995(a) contain specific statutory direction and authority for such continual refinement. To impose a sentence under outmoded guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.[170] The practice of the Parole Commission has been to use the guidelines currently in effect, and this practice has generally withstood challenges that it violated the prohibition against ex post facto laws in Article I, Section 9 of the Constitution.[171] The Committee believes that the reasons given for upholding the Parole Commission practice are equally applicable to the sentencing guidelines: the statutory maximum sentence applicable for an offense is unchanged by an alteration in the guidelines. Instead, the guidelines are designed to structure the exercise of discretion in making decisions, primarily to accommodate increased knowledge as to how differences among offenses or offenders should affect sentences. The guidelines do not eliminate the discretion to set a release date outside the guidelines if there is a valid reason for doing so.

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[168] See discussion of proposed 18 U.S.C. 3551(a).

[169] See W. Smith, Remarks at the Vanderbilt Univ. School of Law 10-11 (Mar. 3, 1983); N. Carlson, *supra* note 167 at 8.

[170] See the discussion of 28 U.S.C. 991(b)(1)(B)

Subsection (a)(6) requires the judge to consider "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct". A similar provision, proposed 28 U.S.C. 991(b)(1)(B), is directed to the Sentencing Commission. These provisions underline the major premise of the sentencing guidelines—the need to avoid unwarranted sentencing disparity. The subsection requires judges to avoid unwarranted disparity in applying the guidelines and particularly in deciding when it is desirable to sentence outside the guidelines.

The Committee considered and rejected a proposal by the American Bar Association to include a so-called "lockstep" procedure which would mandate consideration by the sentencing judge in ordered fashion of a series of several sentencing alternatives prior to sentencing an individual.

In the Committee's view, the "lockstep" procedure is superfluous and incompatible with a sentencing guidelines system. The bill already requires the judge to consider all available sentences, and is neutral on what sentence is most appropriate for a given offense. The guidelines and policy statements of the Sentencing Commission, not a mechanistic examination of alternative sentences which may not even be applicable to a particular case, should guide the sentencing judge.

Subsection (b) of proposed 18 U.S.C. 3553 was added to S. 1437 during the Senate debate in the 95th Congress.[172] It requires the sentencing judge to impose a sentence consistent with the sentencing guidelines unless he finds in the case an aggravating or mitigating circumstance that was not adequately considered in the formulation of the sentencing guidelines and that should result in a different sentence from that recommended in the guidelines.

At the same time the provision provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines. A particular kind of circumstance, for example, might not have been considered by the Sentencing Commission at all because of its rarity, or it might have been considered only in its usual form and not in the particularly extreme form present in a particular case. The provision recognizes, however, that even though the judge finds an aggravating or mitigating circumstance in the case that was not adequately considered in the formulation of guidelines, the judge might conclude that the circumstance does not justify a sentence outside the guidelines. Instead, he might conclude that a sentence at the upper end of the range in the guidelines for an aggravating circumstance, or at the lower end of the range for a mitigating circumstance, was more appropriate or that the circumstance should not affect the sentence at all.

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[171] *Portley* v. *Grossman*, 444 U.S. 1311 (Rehnquist, Circuit Justice, 1980); *Warren* v. *United States Parole Commission*, 659 F.2d 183, 193–97 (D.C. Cir. 1981), cert. denied, 455 U.S. 950; *Zeidman* v. *United States Parole Commission*, 593 F.2d 806 (7th Cir. 1979); *Rifai* v. *United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Ruip* v. *United States*, 555 F.2d 1331 (6th Cir. 1977); *Kreis* v. *Seigler* (No. 75–1543, M.D. Penn., Mar. 31, 1976). But see, e.g., *Geraghty* v. *United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978), reversed and remanded on other grounds, 445 U.S. 388, and *United States* v. *Tully*, 521 F. Supp. 331 (D. N.J. 1981), in which concern is expressed that, if the amended parole guidelines are applied mechanically rather than on an individualized basis, there would be an *ex post facto* problem.

[172] 124 Cong. Rec. S 289, January 23, 1978 (daily ed.).

The Committee rejected an amendment by Senator Mathias which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in a particular case. The Mathias amendment would have permitted deviations from the guidelines whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation, whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the sentencing guidelines.

The Committee resisted this attempt to make the sentencing guidelines more voluntary than mandatory, because of the poor record of States reported in the National Academy of Science Report which have experimented with "voluntary" guidelines. In his testimony before the Committee on the Comprehensive Crime Control Act of 1983 (S. 829), the District Attorney for Middlesex County, Massachusetts, Scott Harshbarger, noted that the voluntary guidelines in Massachusetts were completely ineffective in reducing sentencing disparities and imposing a rational order on criminal sentencing in the State, because judges generally did not follow them.

Subsection (c) contains a new requirement that the court give the reasons for the imposition of the sentence at the time of sentencing. It also requires, if the sentence is within the guidelines, the court to give the reason for imposing sentence at a particular point within the range. Further, if the sentence is not within the sentencing guidelines, the court must state the specific reason for imposing a sentence that differs from the guidelines. This requirement would essentially explain why the court felt the guidelines did not adequately take into account all the pertinent circumstances of the case at hand. If the sentencing court believed the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range. The need for consistency in sentences for similar offenders committing similar offenses should be sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range. An offender should not receive more favorable or less favorable treatment because he happens to be sentenced by a particular judge. A judge who disagrees with a guideline may, of course, make his views known to the Sentencing Commission and may recommend such changes as he deems appropriate.

The statement of reasons is made in open court. The Committee does not intend that the statement of reasons for a sentence within the guidelines become a legal battleground for challenging the propriety of a particular sentence or the probation or institutional program in which the defendant is placed. In particular, the Committee does not intend a statement that one purpose of a particular sentence is to permit the defendant to participate in a rehabilitation program to be the basis of a defendant's challenge to participation in the program because it is allegedly ineffective. It is also important that the judge state general reasons for a sentence within the applicable guideline to inform the defendant and the public of the reasons why the offender is subject to that particular guideline and in order to guide probation officers and prison officials to develop a program to meet his needs.

The statement of reasons for a sentence outside the guidelines is especially important. Under proposed 18 U.S.C. 3742, a defendant may appeal a sentence above the applicable guidelines, and the government may appeal a sentence below the guidelines. If the appellate court finds that a sentence outside the guidelines is unreasonable, the case may be remanded to the trial court for resentencing or the sentence may be amended by the appellate court. The statement of reasons will play an important role in the evaluation of the reasonableness of the sentence. In fact, if the sentencing judge fails to give specific reasons for a sentence outside the guidelines, the appellate court would be justified in returning the case to the sentencing judge for such a statement.

Sentences within the guidelines are subject to appeal under proposed 18 U.S.C. 3742 on grounds of illegality or an incorrect application of the guidelines. As with sentences outside the guidelines, the statement of reasons may play a role in the appellate court's decision on the legality of sentences. The statement of reasons in cases claiming incorrect application of the guidelines will probably play only a minor role in the appellate process because the sentencing court will be deciding factual issues concerning offense and offender characteristics which might not be discussed in the statement of reasons.[173]

Regardless of the grounds for appeal, the statement of reasons should not be subjected to such legalistic analysis that will make judges reluctant to sentence outside the guidelines when it is appropriate or that will encourage judges to give reasons in a standardized manner.

The statement of reasons also informs the defendant and the public of the reasons for the sentence. It provides information to criminal justice researchers evaluating the effectiveness of various sentencing practices in achieving their stated purposes. Finally, it assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.

The Committee added subsection (d) to S. 1722 in the 96th Congress to allay concerns of the business community that an order of notice to victims under section 3555 or an order of restitution under section 3556 might be imposed without adequate consideration by the court of the issues involved. The subsection requires the court to give prior notification to the defendant and the government that it is considering imposing such an order of notice as part of the sentence. The purpose of the notification is to enable the parties to prepare adequately for the sentencing hearing. The subsection also requires that the court, upon motion of the defendant or the government or on its own motion, (1) permit the parties to submit affidavits and written memoranda concerning matters relevant to the imposition of an order of notice or restitution, including identification of individual victims or classes of victims, valuation issues, and defenses that a defendant could assert in a civil action with respect to any victim; (2) afford counsel an opportunity to address in open court the issue of the appropriateness of such an order; and (3) include in its statement of reasons for the sentence specific reasons for imposing the order. The court may also, upon motion of either party or its own motion, employ additional procedures, including hearing the testimony of witnesses, that it concludes will not unduly complicate or prolong the sentencing process. The Committee does not intend that the procedure be used to resolve difficult issues; if the complexity would unduly complicate or prolong the sentencing process, the court should not consider imposing an order of notice that would have to rest upon a resolution of such complexity, although in some cases the court might find it possible and advisable to accept such facts as more readily can be resolved and use them as the basis for a more limited order of notice.

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[173] The government has the right under current law to seek correction of an illegal sentence by a writ of mandamus. See *United States* v. *Denson*, 588 F.2d 1112, 1127 (5th Cir. 1979). Such sentences will be appealable under proposed 18 U.S.C. 3742.

SECTION 3554. ORDER OF CRIMINAL FORFEITURE

1. In general

At common law, a person convicted of treason and certain other felonies automatically forfeited to the crown his personal goods and chattels.[174] Furthermore, when a person had been attainted[175] for an act of high treason[176] or outlawry,[177] all of his interests in real property held at the time of the offense or acquired since that time were forfeited to the crown. According to Blackstone, the rationale for criminal forfeiture was that:[178]

> [H]e who hath thus violated the fundamental principles of government, and broke his part of the original contract between king and people, hath abandoned his connection with society; and hath no longer any right to those advantages, which before belong to him purely as a member of the community; among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man,

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[174] *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (opinion of Mr. Justice Story).

[175] Attainder was a legal declaration of a man's death which occurred as an inevitable consequence of the declaration of final sentencing for high treason or outlawry; once attainted a person could not act as a witness in court, make a will, convey property, or bring an action. 4 Blackstone, *Commentaries* 347 (New ed. 1813).

[176] High treason generally included killing the king, promoting revolt against the king, or counterfeiting the great seal. *Id.* at 66–75.

[177] Outlawry consisted of flight while accused of an offense. It was declared *in absentia* but was attaintable only in cases where treason had originally been charged. *Id.* at 353.

[178] *Id.* at 349.

> not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections.

While there is one indication that the concept of criminal forfeiture was used in the colonies, the First Congress by Act of April 20, 1790,[179] abolished forfeiture of estate and corruption of blood, including such punishment in cases of treason. From that time until 1970 there was no criminal forfeiture provision in the United States Code. In 1970, Congress passed Title IX of the Organized Crime Control Act and Title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[180] which reinstated the common law provision of criminal forfeiture in organized crime cases and major drug trafficking cases. The purpose for enacting these provisions was to give law enforcement authorities greater flexibility in their fight against organized crime. In addition to the traditional penalties of imprisonment and fines, this provision was intended to separate the leaders of organized crime from their sources of economic power.[181]

In any discussion of forfeiture statutes, it is important to distinguish between criminal forfeiture and civil forfeiture. Criminal forfeiture is part of the sentence imposed upon conviction for a particular crime. In this sense, the proceeding is in personam against the defendant. There is no additional proceeding required before the property is forfeited to the United States.[182] The forfeiture is automatic upon imposition of sentence. On the other hand, under those Federal statutes which provide for civil forfeiture, the forfeiture is not part of the sentence. Before property may be civilly forfeited, the United States Attorney must bring a separate *in rem* action against property which is declared to be unlawful or contraband under the statute, property which is used for an unlawful purpose, or property which is used in connection with the prohibited act or transaction. The concept of an *in rem* action is that the property is the offender and thus the action is brought against the property,[183] a concept that developed from the ancient Roman religious practice of deodands. According to this custom, when a person was accidentally killed the object that caused his death—the tree that fell on him, the horse that threw him, or the bull that gored him—was forfeited to the church.[184] Later, the crown replaced the church as the recipient of the forfeited object or its value and the proceeds were distributed for charitable purposes.[185] Today, examples of civil forfeiture provisions are those contained in the customs, narcotics, and revenue laws.

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[179] 1 Stat. 117.

[180] 18 U.S.C. 1963 and 21 U.S.C. 848(a)(2). The former provision was held constitutional in *United States* v. *Amato*, 367 F. Supp. 547 (S.D.N.Y. 1973).

[181] See S. Rept. No. 91-617, 81st Cong., 1st Sess. 79 (1970).

[182] Thus, 28 U.S.C. 2461(b), which provides that "[u]nless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty", is not applicable to cases coming under this section.

[183] *Calero-Toledo et al.* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

[184] Blackstone, *Commentaries* 306 (New ed. 1813); 3 Coke, *Institute*, 57–58 (1817 ed.).

[185] Holmes, *The Common Law* 25 (1938 ed.).

2. *Provisions of the bill, as reported*

Proposed 18 U.S.C. 3554 carries forward by cross-reference the provisions of 18 U.S.C. 1963, relating to criminal forfeiture in organized crime cases, and section 413 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 848), relating to criminal forfeiture in drug trafficking cases. The references are included here in order to assure that this chapter includes a complete description of sentencing options. Under proposed 18 U.S.C. 3551(b) and (c), an order of criminal forfeiture may be imposed on an individual or an organization in combination with any other form of sentence. Under proposed 28 U.S.C. 994(a)(2)(A), the United States Sentencing Commission is required to issue policy statements concerning the appropriate use of an order of criminal forfeiture.

SECTION 3555. ORDER OF NOTICE TO VICTIMS

1. *In general*

Proposed 18 U.S.C. 3555 is a new provision which allows a court to require a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices to give notice and explanation of the conviction to the victims of the offense.

2. *Present Federal law*

There are no provisions of current Federal law which require an offender to give notice of his conviction to his victims.[186] There is, however, an analogous concept contained in present statutes that require motor vehicle and tire manufacturers to notify the Secretary of Transportation of defects in their products and that permit the Secretary to disclose defects to the public (15 U.S.C. 1402(d)). The extension of the concept to the area of criminal law was proposed by the National Commission on Reform of Federal Criminal Laws.[187]

3. *Provisions of the bill, as reported*

This section will permit a court to assure notification to the persons injured by a multiple victim offense involving fraud or other intentionally deceptive practices that the perpetrator of the offense has been adjudged criminally responsible. The provision should facilitate any private actions that may be warranted for recovery of losses. Without such a provision, many victims of major fraud schemes may not become aware of the fraud (for example, that the mining stock they purchased is counterfeit) until it is too late to seek legal redress, or may not be able to ascertain the perpetrator's current whereabouts (for example, a "fly-by-night" roofing operation). The provision should also serve to alert fraud victims to the advisability of other action on their part (for example, news of the worthlessness of a phony "cancer cure" may prompt a victim to visit a doctor in time for proper medical attention).

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[186] Under current law, a court could accomplish the same result as a condition of probation, but could not require such notice in more serious cases in which imprisonment, rather than probation, is warranted. Also, the Federal Trade Commission today has considerable latitude in formulating cease and desist orders pursuant to 15 U.S.C. 45, violation of which is a criminal offense, to require a party which has engaged in unfair methods of competition such as false advertising, to take affirmative steps to assure that the deception is prevented in the future. See, e.g., *Waltham Watch Company* v. *Federal Trade Commission*, 318 F.2d 28, 32 (7th Cir. 1963), citing *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470; *L. Heller & Son. Inc.* v. *Federal Trade Commission*, 191 F.2d 954 (7th Cir. 1951).

[187] National Commission Final Report, *supra* note 1, § 3007.

The provisions may be expected to result in an increase in individual actions and class actions for civil recovery, and should have the collateral effect of reducing the attractiveness of large-scale, profit-seeking, deceptive practices.[188] While the perpetrator of a fraud may be convicted upon the testimony of one or two victims, the vast majority of those who have suffered from his offenses are not as readily identifiable. Since their potential claims remain unsatisfied for want of knowledge as to the offender's criminal responsibility and whereabouts, and since current fine levels are rarely high enough to permit the court to reach more than a fraction of the defendant's realized profits, the defendant, after serving the relatively limited period of imprisonment that is ordinarily imposed upon white collar defendants, is often free to enjoy a substantial remainder of the profits of his criminal venture. In combination with the higher fines that may be imposed under the bill, this provision's prompting of a substantially increased likelihood of successful civil suits should materially decrease the incentive to engage in this kind of criminal operation.

The power of the court to designate the advertising areas and media in which notice is to be given, and to approve the form of the notice, avoids the possibility of the offender's making only token efforts to give notice. It is actual notice rather than constructive notice that is sought to be obtained. Thus, if the group injured is readily identifiable and small, notice by letters to individuals may be sufficent. If there are multiple unknown persons injured, as in the case of a major fraud, specified newspaper ads might be used. The power of the court to approve the form of notice will give the court the ability to assure that the notice is adequate to explain to persons wronged by the offense what the defendant has done. Incentive to abide by a court's order under this section is provided not only by the court's contempt power, but also by permitting the fulfillment of the order to be made an express condition of probation in those cases in which imprisonment is not also imposed[189] or an express condition of post-release supervision if such a term is imposed.[190]

Several changes in section 3553 from the version contained as section 2005 in S. 1437 of the 95th Congress were made by the Committee in the 96th Congress.[191] The changes were in response to the concern of the business community that the provision might be used in an inappropriate case, such as a technical violation of a regulatory requirement, with resulting injury to business and reputation not justified by the nature of the offense or the amount of harm done by it. The changes also reflect concerns that, even where notice might be appropriate, costs of giving notice might exceed costs that should reasonably be borne by the offender given the nature of the offense and the amount of harm done. Accordingly, the Committee has limited the nature of the offenses for which notice may be ordered to those offenses that involve fraud or other intentionally deceptive practices, regardless of whether the offense is committed by an individual or by an organization. The Committee has also amended the notice requirement to provide that the convicted offender may be ordered to give "reasonable" notice and explanation of the offense and to require that the judge shall consider, in determining whether to require notice, not only the factors set forth in section 3553(a), but also the cost of giving notice as it relates to the loss caused by the offense. In addition, the Committee has limited to $20,000 the amount of costs that the court may order the defendant to pay for such notice.[192]

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[188] See generally 16 Cr. L. Rptr. 2178–2183 (Nov. 1974) (transcript of interview with Judge Charles R. Renfrew of the United States District Court of the Northern District of California.)

[189] See proposed 18 U.S.C. 3563(b)(4).

[190] See proposed 18 U.S.C. 3583(d).

[191] See proposed 18 U.S.C. 2005 in S. 1722, 96th Cong., 1st Sess., as reported.

These amendments are intended to assure that the order of notice requires only such publication as is reasonable under the circumstances of the case. In a major fraud case involving identifiable consumers defrauded of substantial amounts of money, the defendant might reasonably be expected to give individual notice. In a major fraud case involving hundreds or thousands of consumers, each of whom sustained minor losses, notice might more appropriately be given by publication in newspapers reaching the bulk of the persons defrauded instead of individual notice. The Committee does not intend that the section be used to order "corrective advertising" or to subject a defendant to public derision. Publication should not be required beyond that which is necessary to notify the victims of the defendant's conviction. Further, if identifying the victims is so complex an undertaking that it could unduly complicate or prolong the sentencing process, the court should not require that such notice be given other than to those victims who can more readily be identified. The procedures set forth in section 3553(d) should assist the court in determining whether notice should be ordered in those cases in which complex issues are not raised. The fact that notice was ordered or given is not intended to confer any legal right on any person, and the notice may include a caveat that it is merely informational and creates no legal rights.

Proposed 18 U.S.C. 3742 permits a defendant to appeal a sentence that includes an order of notice. Because of the potential harm to business and reputation, the execution of an order of notice should be stayed pending appeal unless the court finds that the appeal or petition for review of sentence is frivolous or taken for purposes of delay.

SECTION 3556. ORDER OF RESTITUTION

Proposed 18 U.S.C. 3556 carries forward by cross-reference the restitution provisions enacted as 18 U.S.C. 3579 and 3580 by section 5(a) of the Victim and Witness Protection Act of 1982, and redesignated as 18 U.S.C. 3663 and 3664 by section 202(a)(1) of the bill. The bill includes the reference here in order to complete the description of available criminal sentences, and to show how the order of restitution can be used in conjunction with other sentences. Thus, proposed 18 U.S.C. 3551 (b) and (c) make clear that an order of restitution may be imposed in addition to any other kind of sentence. Proposed 28 U.S.C. 994(a)(2)(A) requires that the United States Sentencing Commission issue policy statements concerning the appropriate use of orders of restitution. Finally, proposed 18 U.S.C. 3563(a)(2) requires that, if a person convicted of a felony is sentenced to a term of probation, a condition of that probation must be that he pay a fine or restitution, or perform community service.

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[192] In certain cases where the execution of the order has not been stayed, any costs in excess of that amount might be assumed (or costs pending payment of the ordered amount might temporarily be assumed) by the government, if otherwise appropriate and authorized, especially in cases in which timely notice is important because of the fraud's risk to the health of the victims or because of the incipient running of the civil statute of limitations.

18 U.S.C. 3579(g), as enacted by section 5(a) of the Victim and Witness Protection Act of 1982 and redesignated as 18 U.S.C. 3663(g) by this bill, requires that if a defendant who is ordered to pay restitution is placed on probation, the payment of restitution is a condition of probation. Failure to satisfy this condition would be a violation subject to the provisions of proposed 18 U.S.C. 3565. An order of restitution may also be made a condition of a term of supervised release imposed to follow a term of imprisonment pursuant to proposed 18 U.S.C. 3583(d). Violations of such a condition of post-release supervision would be contempt of court.

SECTON 3557. REVIEW OF A SENTENCE

This section, which has no counterpart in current law, refers to the provisions in proposed 18 U.S.C. 3742, which define the circumstances and procedures for review of sentences imposed pursuant to proposed 18 U.S.C. 3551. The systematized guideline sentencing procedures introduced by this bill are designed to eliminate from Federal criminal law the plainly disproportionate sentence. The provisions for appellate judicial review of sentences in section 3742 are designed to reduce materially any remaining unwarranted disparities by giving the right to appeal a sentence outside the guidelines and by providing a mechanism to assure that sentences inside the guidelines are based on correct application of the guidelines.

SECTION 3558. IMPLEMENTATION OF A SENTENCE

This section simply calls attention to the provisions of proposed chapter 229 of title 18, which govern the implementation of sentences imposed pursuant to section 3551.

SECTION 3559. SENTENCING CLASSIFICATION OF OFFENSES

1. In general

Proposed 18 U.S.C. 3559 describes what letter grade in proposed 18 U.S.C. 3581 will apply to an offense for which no letter grade is otherwise specified. It also provides that the maximum fine is the fine authorized by proposed 18 U.S.C. 3571(b) or by the statute describing the offense, whichever is greater.

2. Present Federal law

There is no counterpart for this provision, since current law contains no systematic grading scheme for sentences.

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3559 did not appear in S. 1437 as passed by the Senate in the 95th Congress. That bill instead specified the applicable grade for each offense defined in title 18 and amended each section outside title 18 that described an offense to indicate the sentence grade that applied to the offense. In general those amendments specified that an offense outside title 18 had the grade for which the proposed Criminal Code specified a maximum term of imprisonment closest to that for the offense in current law.

The Committee has reexamined the desirability of amending current law in an attempt to conform sentencing provisions to the grading scheme of the bill, and has decided that a general provision such as section 3559 is preferable at this time. To amend each individual section implies that the Committee has given careful consideration to grading all existing offenses, when, in fact, this has not been the case. Instead, the Committee has postponed the restructuring of Federal offenses according to their relative seriousness. The Sentencing Commission will undoubtedly have recommendations concerning the appropriate grades for offenses as it develops sentencing guidelines. Current maximum penalties are set at very uneven levels, and some are so inconsistent with the relative seriousness of the offense that the Sentencing Commission will probably find it necessary to recommend some amendments before sentencing guidelines are in place. The Committee will welcome the Commission's suggestions.

Two primary goals are achieved by this section. The first clarifies the applicability of the various sentencing provisions in title 18 by indicating how the new grading scheme will apply to existing offenses until they are graded by legislation. The second substantially increases maximum fine levels for most offenses. Section 3559 achieves these goals in a simple fashion without implying that sentences have been rationalized—a step which the Committee believes should be undertaken with the assistance of the Department of Justice, the United States Sentencing Commission, and other interested agencies, after passage of this bill. Not only are there too many criminal offenses, and little rationality in the sentences provided for those offenses, but there is also no clear line between the use of civil and criminal sanctions for essentially regulatory offenses.

Section 3559 (a) grades offenses for which no letter grade is provided according to the maximum term of imprisonment applicable to the offense.

Section 3559 (b) states that the sentence for an offense graded according to subsection (a) has the attributes of any other sentence with that grade under the bill with one exception: the fine may not exceed the maximum fine authorized by the bill or the statute that describes the offense, whichever is higher. Thus, section 3559 will often have the effect of increasing the maximum fine provided in current law, but never of lowering it.

The Committee intends that future legislation creating new Federal offenses specify the grade for the offense. It encourages the Committees with other substantive jurisdiction to consult with this Committee and the Department of Justice in determining the appropriate grade for offenses. The Committee is aware, however, that future legislation may be passed that inadvertently fails to take these steps. Accordingly, section 3559 will clarify questions that might otherwise arise as to the applicability of the general Federal sentencing law to the new offense.

SUBCHAPTER B—PROBATION

(Sections 3561-3566)

This subchapter governs the imposition, conditions, and possible revocation of a sentence to a term of probation. In keeping with modern criminal justice philosophy, probation is described as a form of sentence rather than, as in current law, a suspension of the imposition or execution of sentence.

SECTION 3561. SENTENCE OF PROBATION

1. In general

Proposed 18 U.S.C. 3561 authorizes the imposition of a sentence to a term of probation in all cases, unless the case involves a Class A or B felony or an offense for which probation has been expressly precluded, or the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense. The section also specifies the maximum permissible terms of probation and specifies a minimum of one year's probation for a convicted felon. Separate terms are set forth for felonies (not less than one nor more than five years), misdemeanors (not more than two years), and infractions (not more than one year).

2. Present Federal law

18 U.S.C. 3651 authorizes the court to suspend the imposition or execution of the sentence of a person convicted of an offense, other than one punishable by death or life imprisonment, and place the person on probation.[193] The maximum term of probation, including any extension, is five years for any offense. The section also provides that, if an offense is punishable by more than six months in prison but is not punishable by death or life imprisonment, the judge may impose a sentence split between imprisonment and probation. Such a split sentence must be for a term in excess of six months, with no more than six months spent in prison, and with the remainder suspended and the defendant placed on probation. A few statutes, such as 18 U.S.C. 924(c), provide that an offender convicted of a particular offense may not be placed on probation.

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3561, unlike current law, states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence. Section 3561(a) specifies that a term of probation may be imposed except in three instances.

First, subsection (a)(1) excludes Class A and Class B felony offenders from receiving a sentence of probation, thus excluding, as does present law, those offenders subject to a penalty of life imprisonment or death. The section goes beyond current law by also precluding a sentence of probation for those convicted of an offense with a maximum authorized prison term, pursuant to § 3581(b)(2), of not more than 25 years. Second, under subsection (a)(2), probation is unavailable to an offender who is convicted of an offense for which the imposition of a sentence of probation is specifically precluded.[194]

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[193] See proposed 18 U.S.C 3551; ABA, "Standards Relating to Sentencing Alternatives and Procedures," § 18-2.3(a) (1979).

Third, subsection (a)(3) differs from the provision of 18 U.S.C. 3651 that permits a sentence to be split between a term of imprisonment and a suspended sentence with probation[195] by specifically barring a sentence to probation in a case in which a defendant has been sentenced at the same time to a term of imprisonment either for the same offense or for a different offense. The same result may be achieved by a more direct and logically consistent route—under sections 3581 and 3583, the court may provide that the convicted defendant serve a term of imprisonment followed by a term of supervised release. The provision will permit latitude in the specification of the time to be spent in the custody of the Bureau of Prisons and in the nature of the facility. It will also be more flexible than current law in permitting a sentence to imprisonment of any permissible length to be followed by a term during which the defendant receives street supervision. The Committee is of the opinion that this flexibility will permit the court to formulate a sentence best suited to the individual needs of the defendant. For example, a convicted defendant could in an appropriate case be required to spend the first three months in prison, followed by two years of street supervision, or could be sentenced to spend two years in prison followed by six months' street supervision. If, instead, the judge believes that full-time incarceration of a convicted defendant is not appropriate but is concerned that the defendant needs more supervision than is generally available to a person on street supervision, he can sentence him to probation on the condition that he spend evenings or weekends in prison as a condition of probation (section 3563(b)(11)) or live in a community corrections facility during part of his term of probation (section 3563(b)(2)). Such provision would permit the defendant to continue employment and his contacts with his family and community.

A major distinction between the proposed section and existing law is the maximum term of probation authorized for an offense. 18 U.S.C 3651 provides a term of probation of up to five years without regard to the seriousness of the offense. Section 3561(b), on the other hand, provides for differing terms depending on the seriousness of the violation. When the offense is a felony there is a minimum term of one year and a maximum of five years. A misdemeanor conviction may lead to a term of probation of up to five years with no required minimum. An infraction may result in up to one year's probation, again with no minimum.[196]

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[194] The Committee generally looks with disfavor on statutory minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws. The Committee believes that for most offenses the sentencing guidelines will be better able to specify the circumstances under which an offender should be sentenced to a term of imprisonment and those under which he should be sentenced to a term of probation.

[195] 18 U.S.C. 4205(f) provides a procedure, which achieves the same result, by which the court may specify that a person sentenced to a term of imprisonment of more than six months and less than one year shall be released as if on parole at a date prior to the expiration of his sentence.

While the Committee is generally opposed to statutory minimum sentences, it believes that a convicted felon who is sentenced to probation rather than to a term of imprisonment should be subject to the jurisdiction of the court for a period of at least a year. Requiring this minimum probationary period will assure that he is able to comply with the law for that period and that he will be subject to at least one other condition set forth in section 3563(a)(2).

The section, like current law, creates no presumption for or against probation. The Committee believes that the sentencing guidelines can more adequately delineate those cases in which a term of probation is preferable to a term of imprisonment, or vice versa, as a means of achieving the purposes of sentencing set forth in section 3553(a)(2).

SECTION 3562. IMPOSITION OF A SENTENCE OF PROBATION

1. In general

Section 3562 sets forth the criteria to be considered by the court in determining whether to impose a sentence of probation and in determining the length of the term and the conditions of probation. It also makes clear that, despite the susceptibility of a term of probation to modification, revocation, or appeal, a judgment of criminal conviction that includes such a sentence constitutes a final judgment for all other purposes.

2. Present Federal law

18 U.S.C. 3651 authorizes the court to impose probation when it is "satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby."[197] 18 U.S.C. 5010(a) permits the judge to place a youth offender or young adult offender [198] on probation if the "court is of the opinion that the * * * offender does not need commitment". Probation is a matter of discretion and not of right.[199]

While the statutory law is silent on the subject of the finality of a judgment that includes probation, the courts have held that such a judgment, whether it suspends execution of the sentence or suspends imposition of sentence, constitutes a final judgment for purposes of appeal from conviction.[200] They have also held that the courts may not suspend imposition or execution of sentence unless they place the convicted offender on probation.[201]

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[196] The National Commission had proposed inflexible terms of probation of five years for a felony, 2 years for a misdemeanor, and 1 year for an infraction. The Committee believes that such fixed periods might unduly restrict the court's options. See the recommendation of the National Legal Aid and Defender Association, Subcommittee Criminal Code Hearings, Part III, at 1420.

[197] It has been held that probation is authorized, under reasonable conditions, pursuant to this statute for organizations as well as individuals. *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972), *United States* v. *J. C. Ehrlich Co. Inc.*, 372 F. Supp. 768 (D. Md. 1974).

[198] See 18 U.S.C. 4216.

[199] *United States* v. *Birnbaum*, 421 F.2d 993 (2nd Cir.), cert. denied, 397 U.S. 1044, rehearing denied, 398 U.S. 944 (1970).

[200] *Korematsu* v. *United States*, 319 U.S. 432 (1943).

[201] *United States* v. *Ellenbogen*, 390 F.2d 537 (2d Cir.), cert. denied, 393 U.S. 918 (1968).

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3562 requires that the judge, in determining whether to impose a sentence to a term of probation upon an organization or an individual, and in setting the term and conditions of any sentence to probation that is imposed, consider the factors set forth in section 3553(a) to the extent that they are applicable. In the abstract, the factors required to be considered create no presumption either for or against probation. They are set out merely to make more specific the considerations traditionally taken into account by the courts under the broad language of 18 U.S.C. 3651 and to assure their being given appropriate weight in all cases. They are designed to assist the court in exercising its discretion reasonably.

The effect of these considerations is to require the court to focus carefully upon the needs of the defendant and the needs of society. Those who emphasize the rehabilitative purpose of sentencing to the exclusion of other purposes have supported the view that probation should be the sentence of preference.[202] Others who would emphasize the necessity of providing effective deterrence to criminal conduct and to insure just punishment of offenders in a time of rapidly rising crime rates have suggested that there should be a presumption against the utilization of the sentence of probation for some of the most serious offenses by calling for mandatory minimum prison terms. There is no doubt that imprisonment, when compared with probation, is more effective as punishment, is more readily perceived by the public as a deterrent, and is clearly the most effective means of incapacitation for protection of the public. On the other hand when the purpose of sentencing is to provide the educational opportunity, vocational training, or other correctional treatment required for rehabilitation, given the current state of knowledge, probation is generally considered to be preferable to imprisonment. This does not mean, however, that it is not possible to formulate conditions of probation that will serve deterrent and punishment purposes—or even limited incapacitative purposes—in an appropriate case. Thus, the Committee feels that the best course is to provide no presumption either for or against probation as opposed to imprisonment, but to allow the Sentencing Commission and, under its guidelines, the courts, the full exercise of informed discretion in tailoring sentences to the circumstances of individual cases.

In a particular case, the required consideration of the purposes of sentencing and of the sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a) should serve to sharpen the court's focus on all matters pertinent to its decision. The Committee is of the view that in the past there have been many cases, particularly in instances of major white collar crime, in which probation has been granted because the offender required little or nothing in the way of institutionalized rehabilitative measures and because society required no insulation from the offender, without due consideration being given to the fact that the heightened deterrent effect of incarceration and the readily perceivable receipt of just punishment accorded by incarceration were of critical importance. The placing on probation of an embezzler, a confidence man, a corrupt politician, a businessman who has repeatedly violated regulatory laws, an operator of a pyramid sales scheme, or a tax violator, may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying substantial deterrent or punitive impact. This is not meant to imply that the Committee considers a sentence of imprisonment to be the only form of sentence that may effectively carry deterrent or punitive weight. It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose.[203] This is particularly true in light of the new requirement in section 3563(a) that a convicted felon who is placed on probation must be ordered to pay a fine or restitution or to engage in community service; he cannot simply be released on probation with no meaningful sanction. Similarly, the Committee expects that in situations in which rehabilitation is the only appropriate purpose of sentencing, that purpose ordinarily may be best served by release on probation subject to certain conditions. In sum, the presence of the same predominant reason for imposing a sentence in different cases will not always lead logically to the same type of sentence. A congressional statement of a preferred type of sentence might serve only to undermine the flexibility that the criminal justice system requires in order to determine the appropriate sentence in a particular case in the light of increased knowledge of human behavior.

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[202] See Subcommittee Criminal Code Hearings, Part XI, at 7796-7862 (statement on behalf of the National Legal Aid and Defenders Association).

The Committee is also mindful that during a period in which the incidence of a particular kind of crime is increasing rapidly, it may be entirely appropriate for the court to give paramount emphasis to the deterrent purpose of sentencing. Conversely, in a situation involving an offense of little notoriety that is not frequently committed and that is committed under circumstances indicating little likelihood of recidivism, the singular significance of the rehabilitative purpose of sentencing may well almost mandate a sentence to probation. In all cases, the section's concentration of attention upon the aims of the criminal justice system is designed to encourage the intelligent balancing of often competing considerations.

The application of the specified considerations requires the court first to consider the nature of the offense and the history and characteristics of the offender. With those in mind, it must then consider the four basic purposes of sentencing as established in section 3553(a)(2) to the extent that one or more of them are applicable to the case, and must examine the sentencing guidelines and policies of the Sentencing Commission. Having considered these factors, the court is then required to determine whether a term of probation would be appropriate and, if so, the length and condition of such a term.

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[203] See, e.g., 16 Cr. L. Rptr. 2178, 2183 (Nov. 1974) (transcript of interview with Judge Charles B. Renfrew of the Northern District of California).

The language of section 3562(b) is intended to codify current judicial decisions which hold that judgments imposing probation are final judgments for all purposes, particularly for purposes of appeal, even though the sentence is subject to compliance with specified conditions, is revocable for noncompliance with those conditions,[204] and is subject to modification, extension, or early termination in certain situations.[205] The language of section 3562(b)(3) is intended to make clear that a sentence that may be appealed because it is outside the guidelines is provisional for the purpose of appeal of the sentence pursuant to section 3742, but is otherwise final.[206]

SECTION 3563. CONDITIONS OF PROBATION

1. In general

Proposed 18 U.S.C. 3563(a) sets forth mandatory conditions of probation. It specifies that the court must provide—as a condition of probation for a defendant convicted of any Federal offense—that the defendant not commit another Federal, State, or local crime during the term of probation, and—as a condition of probation for a defendant convicted of a felony—that the defendant pay a fine or restitution, or engage in community service.

Proposed 18 U.S.C. 3563(b) sets out optional conditions which may be imposed, the last of which makes clear that the enumeration is suggestive only, and not intended as a limitation on the court's authority to consider and impose any other appropriate conditions.

Proposed 18 U.S.C. 3563(c) permits the court, after a hearing, to modify or enlarge the conditions during the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

Proposed 18 U.S.C. 3563(d) requires that the defendant be provided with a written statement clearly setting out all the conditions of the sentence of probation.

2. Present Federal law

18 U.S.C. 3651 authorizes the imposition of probation "upon such terms and conditions as the court deems best." The section does not mandate the imposition of any condition of probation but does list several specific conditions which may be required, i.e., paying of a fine, making of restitution, supporting of dependents, submitting to treatment of addiction, or residing in or participating in the programs of a residential community treatment center. These, however, in view of the broad general grant of statutory authority, have been viewed as examples of, rather than limitations on, the kinds of conditions that a court may place on probation.[207] 18 U.S.C. 3651 also authorizes the court to impose a split sentence, if the maximum authorized term of imprisonment is more than six

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[204] *Nix* v. *United States*, 131 F.2d 857 (5th Cir.), cert. denied, 318 U.S. 771 (1943); *Buhler* v. *Pescor*, 63 F. Supp. 632 (W.D. Mo. 1945).

[205] See, e.g., *United States* v. *Albers*, 115 F.2d 833 (2d Cir. 1940).

[206] See proposed 18 U.S.C. 3742.

[207] See, e.g., *Trueblood Longknife* v. *United States*, 381 F.2d 17, 19 (9th Cir. 1967); *U.S.* v. *Alarik*, 439 F.2d 1349, 1351 (8th Cir. 1971).

months and the offense is not punishable by death or life imprisonment. Such a sentence is for no more than six months' imprisonment with the imposition or execution of the remainder of the sentence suspended and the defendant placed on probation. The court may revoke or modify any condition of probation.

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3563(a) goes beyond the provisions of current law in requiring that the court impose one mandatory condition of probation on an offender convicted of a misdemeanor or an infraction, and two mandatory conditions on an offender convicted of a felony.

Under subsection (a)(1), the court is required to provide as a condition of probation for any offense that the defendant not commit another crime during the term of probation.[208] It should be emphasized, however, that this is the only mandatory condition of probation for an offender convicted of a misdemeanor or an infraction. The court is not required, for example, to specify as a condition of probation even that the offender report regularly to a probation officer since is some cases the court may conclude that unsupervised probation is appropriate.[209]

Under subsection (a)(2), the court is also required to impose on a convicted felon who is sentenced to a term of probation a condition that he pay a fine or restitution,[210] or that he engage in community service. This requirement assures that a convicted felon will receive a publicly discernible penalty even if the circumstances of the offense do not justify a term of imprisonment. It also assures that the sentence will be fashioned to serve deterrent or punishment purposes as well as rehabilitative purposes in appropriate cases. (The court may in appropriate cases impose a combination of the conditions described in subsection (a)(2).)

Proposed 18 U.S.C. 3563(b) lists some of the discretionary conditions that may be placed on a probationer's freedom. These conditions must be reasonably related to the nature and circumstances of the offense, the history and characteristics of the offender, and the four purposes of sentencing set forth in section 3553(a)(2). If a condition involves a deprivation of property or liberty, it must also be reasonably necessary to carry out the purposes of sentencing set forth in section 3553(a)(2). In addition, under section 3562(a), the policy statements and sentencing guidelines promulgated by the Sentencing Commission would be considered in determining the conditions of probation. Most of the conditions set forth in section 3563(b) have been used and sanctioned in appropriate cases under the current statute.[211] The list is not exhaustive, and it is not intended at all to limit the court's options—conditions of a nature very similar to, or very different from, those set forth may also be imposed. On the other hand, except as provided in subsection (a), none of the conditions listed in the subsection is required to be imposed. The conditions, many of which closely follow the proposals of the National Commission,[212] are simply designed to provide the trial court with a suggested listing of some of the available alternatives which might be desirable in the sentencing of a particular offender.[213] It is anticipated that, in determining the conditions upon which a defendant's probation is to be dependent, the court will review the listed examples in light of the Sentencing Commission's guidelines and policy statements, weigh other possibilities suggested by the case, and, after evaluation, impose those that appear to be appropriate under all the circumstances. It is certainly not intended that all the conditions suggested in subsection (b) be used for every defendant, but rather that conditions be tailored to each defendant to carry out the purposes of probation in his case. In addition, the court may not impose a condition of probation which results in a deprivation of liberty for the defendant unless that deprivation is "reasonably necessary" to carry out the purposes of the sentence.

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[208] This provision recognizes statutorily a current practice of the Federal courts.

[209] This differs somewhat from current practice. The form used by Federal judges to list conditions of probation lists a number of conditons routinely imposed, such as maintaining reasonable hours, notifying probation officer of job changes, not leaving the district without notifying the probation officer, and reporting to the probation officer as required. While the Committee agrees that these conditions should be imposed when the case warrants, it does not think the conditions should apply in all cases.

[210] A condition of restitution is a mandatory condition of probation in another sense as well. Under 18 U.S.C. 3579(g) (which is redesignated 18 U.S.C. 3663(g) by section 202(a)(1) of this bill), if a defendant is placed on probation and ordered to pay restitution, the restitution order is a condition of probation by operation of law.

Paragraph (1) carries forward the discretionary probation condition in current law that requires the defendant to support his dependents and expands the condition to permit the court to order in appropriate cases that the defendant meet other family responsibilities.

Paragraph (2) carries forward current law in permitting the imposition of a condition of probation requiring payment of a fine, thus making the recalcitrant offender face the possibility of a summary increase in punishment for such a probation violation, as opposed to leaving him to face only the normal fine collection procedures. Of course, as provided by section 3572(a), the fine may be not set so high that the defendant, acting in good faith, is unable to pay it. A fine may be imposed both as a separate sentence and as a condition of probation. It also may be imposed pursuant to subsection (a)(2) as a mandatory condition of probation on a convicted felon instead of or in addition to a condition ordering payment of restitution or community service.

Paragraph (3) carries forward the current law provision permitting imposition of a condition that the defendant be required to make restitution to a victim. If a person placed on probation is ordered to make restitution, that order automatically becomes a condition of probation.[214] The court could in an appropriate case order restitution not covered by paragraph (b)(3) (and section 3556) under the general provisions of subsection (b)(20). In a case involving bodily injury, for example, restitution as a condition of probation need not necessarily be limited to medical expenses. The defendant in a particular case may have an interest in satisfying such a condition if it will cause the court to forego sentencing him to a term of imprisonment. The court may also choose to impose a requirement of payment of restitution as the mandatory condition of probation he must impose pursuant to subsection (a)(2).

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[211] See, e.g., *Bernal-Zazueia* v. *United States*, 225 F.2d 64 (9th Cir. 1955) (no commission of crime during term of probation); *United States* v. *Wilson*, 469 F.2d 368 (2d Cir. 1972) (support dependents and meet family obligations); *Stone* v. *United States*, 153 F.2d 331 (9th Cir. 1946) (payment of fine, refrain from specified employment); *United States* v. *Velazco-Hernandez*, 565 F.2d 583 (9th Cir. 1977) *United States* v. *Miller*, 549 F.2d 105 (9th Cir. 1976) (refrain from use of alcohol); *Whaley* v. *United States*, 376 U.S. 911 (9th Cir. 1963), cert. denied, 376 U.S. 911 (refrain from employment in business related to offense).

[212] National Commission Final Report, *supra* note 1, § 3103.

[213] While most of the conditions have as their primary purpose the rehabilitation of the offender, some of the listed alternatives, of course, would also tend to affect the punitive and deterrent purposes of sentencing—and even, to a certain degree, the incapacitative purpose in limited kinds of cases.

[214] See 18 U.S.C. 3663(g) (former 18 U.S.C. 3579(g)).

Paragraph (4) permits the judge to require that the defendant give notice of his conviction to victims of the offense in accord with the provisions of section 3555. An order of notice may be both a separate sentence and a condition of probation. Making an order of notice a condition of probation gives the court the possibility of revocation of probation as an enforcement tool for violation of the condition.

Paragraph (5) permits the judge to order as a condition of probation that the defendant work conscientiously at suitable employment or conscientiously pursue a course of study or vocational training that will equip him for suitable employment. When combined with other appropriate conditions, this condition might enable the court to avoid sending to prison some defendants who might otherwise be incarcerated. For example, a judge might devise a probation program for a non-dangerous defendant whereby he spend evenings or weekends in prison or live in a community corrections facility, and work or go to school during the day.

Paragraph (6) suggests the condition that an individual defendant refrain from engaging in a specific occupation, business, or profession, or that either an individual or organization offender engage in a specified occupation, business, or profession only to a stated degree or under specified circumstances. The condition may be imposed only if the occupation, business, or profession bears a reasonably direct relationship to the nature of the offense. Thus a bank teller who embezzles bank funds might be required not to engage in an occupation involving the handling of funds in a fiduciary capacity.[215] Similarly, an organization convicted of executing a fraudulent scheme might be directed to operate that part of the business in a manner that was not fraudulent. The Committee recognizes the hardship that can flow from preventing a person from engaging in a specific occupation, business, or profession, particularly for those activities requiring many years of education and experience. This particular condition of probation should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person. Insofar as this paragraph might be used to disqualify a person from holding a management position in an organization, the Committee emphasizes that, absent some other relationship between the position held and the nature of the offense, such a disqualification must bear a reasonable relationship to an abuse of the managment position for a criminal purpose. Paragraph (6) is intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that exceeds that needed to achieve that result. The Committee has modified paragraph (6) from the langauage in S. 1437 as passed by the Senate in the 95th Congress. The provision had originally been cast in terms of ordering an organization, as well as an individual, to refrain from engaging in a particular occupation, business, or profession. Because of business concerns that the listing of the conditions might encourage inappropriate use to put a legitimate enterprise out of business, that part of the provision has been modified to relate only to individual offenders. This deletion should not be construed to preclude the imposition of appropriate conditions designed to stop the continuation of a fraudulent business in the unusual case in which a business enterprise consistently operates outside the law.

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[215] The constitutional permissibility of such a condition has been recognized. See *Whaley* v. *United States*, 324 F.2d 356 (9th Cir. 1963), cert. denied, 376 U.S. 911 (1964).

Paragraph (7) allows the court to require the offender to refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons.[216] As in the case with the other discretionary conditions of probation listed in section 3563, the conditions suggested by this paragraph would have to be tailored to the particular circumstances of the defendant. For example, if the defendant were a convicted drug trafficker, it might ordinarily make sense to condition his probation upon his avoidance of other known drug traffickers, but if he were to be employed during the period of his probation by a business that makes a practice of hiring former offenders, the application of such a condition would have to be designed to avoid any suggestion that the defendant could not engage in necessary occupational associations with his coworkers.

Paragraph (8) permits the court to require as a condition of probation that the defendant refrain from the excessive use of alcohol and from any use of narcotic drugs or other controlled substances without a prescription from a licensed medical practitioner. It is not intended that this condition of probation be imposed on a person with no history of excessive use of alcohol or any illegal use of a narcotic drug or controlled substance. To do so would be an unwarranted departure from the principle that conditions of probation should be reasonably related to the general sentencing considerations set forth in section 3553 (a)(1) and (a)(2).

Paragraph (9) permits the imposition of a condition of probation prohibiting the defendant from possessing a firearm, destructive device, or other dangerous weapon. While this condition may only be imposed if it is reasonably related to the purposes of sentencing, there are, of course, other Federal, State, and local restrictions on firearms and explosives which may apply to the defendant as well.

Paragraph (10) notes the availability of the condition that the defendant undergo medical or psychiatric treatment as specified by the court and remain in a specified institution if required for medical or psychiatric purposes. Under this paragraph a court may require a defendant to participate in the program of a narcotic or alcohol treatment facility, regularly visit a psychiatrist, participate in a recognized group therapy program, or undergo some other form of treatment for physical or emotional problems. Because receipt of treatment in an institution rather than on an outpatient basis would involve a deprivation of liberty, the judge would have to assure himself that it was reasonably necessary to a purpose of sentencing set forth in section 3553(a)(2) to require residence at an institution.

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[216] This kind of provision has also been recognized as permissible. See *Birzon* v. *King*, 469 F.2d 1241 (2d Cir. 1972). The phrase "unnecessarily associating" is meant to be construed as not precluding "incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer." *Arciniega* v. *Freeman*, 404 U.S. 4 (1971).

Paragraph (11) authorizes as a condition that the probationer remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time not to exceed in the aggregate one year, during the first year of probation. This provision permits short periods of commitment to a training center or institution as a part of a rehabilitative program. Flexibility is provided by permitting confinement in split intervals, thus authorizing, for example, weekend imprisonment with release on probation during the week for educational or employment purposes, or nighttime imprisonment with release for such purposes during working hours. This condition could be used only to deprive the defendant of his liberty to the extent "reasonably necessary" for the purposes set forth in section 3553(a)(2). It could also be used, for example, to provide a brief period of confinement, e.g., for a week or two, during a work or school vacation. It is not intended to carry forward the split sentence provided in 18 U.S.C. 3651, by which the judge imposes a sentence of a few months in prison followed by probation. If such a sentence is believed appropriate in a particular case, the judge can impose a term of imprisonment followed by a term of supervised release under section 3583, which section was amended by the Committee in the 97th Congress to permit such application.

Paragraph (12) provides that the judge may impose as a condition of probation that the defendant reside at, or participate in the program of, a community corrections facility for all or part of the term of probation.

Paragraph (13) provides that the judge may require as a condition of probation that the defendant work in community service as directed by the court. This provision is intended by the Committee to encourage continued experimentation with community service as an appropriate condition in some cases. This condition is also one of the three choices from which the judge must select a mandatory condition to be imposed on a convicted felon who is sentenced to probation. This condition might prove especially useful in a case in which the imposition of a fine or restitution is not appropriate, either because of the defendant's inability to pay or because the victims cannot be readily identified or the actual amount of injury is slight.

Paragraph (14) notes that the probationer may be required to reside in a certain place or refrain from residing in a particular place, thus permitting the court to remove the defendant from a detrimental environment which apparently contributed to his prior anti-social behavior (e.g., a criminogenic environment) and to reside during the term of probation in an area—perhaps in a distant district [217] more conducive to rehabilitation.

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[217] See proposed 18 U.S.C. 3605.

Paragraphs (15) through (19) contain commonly employed conditions relating to day-to-day supervision of a probationer. Paragraph (15) permits the court to order that the defendant remain in the jurisdiction of the court unless he receives permission from the court to leave. In appropriate cases, of course, jurisdiction over the probationer may be transferred from one district to another, even on a short-term basis, in order to assure continuing supervision over the probationer. Paragraph (16) permits the court to order that the defendant report to a probation officer as directed by the court or the probation officer. This condition in not mandatory—a defendant may be placed on unsupervised probation with only the condition that he not commit a crime or with another condition that does not require day-to-day supervision, such as an order to pay a fine or to make restitution. Paragraph (17) permits the judge to order as a probation condition that a probation officer be permitted to visit the defendant at home or at another place specified by the court (but not by the probation officer). Paragraph (18) relates to answering inquiries of the probation officer and notifying him of any change of address or employment. Paragraph (19) permits the court to require that the defendant notify the probation officer promptly if he is arrested or questioned by a law enforcement officer.

Finally, paragraph (20), like current law, permits the judge to fashion other conditions of probation. These would include, inter alia, conditions to achieve the assistance of the defendant in effectuating the goals of other listed conditions.

Unlike current law, subsection (b) specifically states that the conditions must be reasonably related to the factors set forth in section 3553 (a)(1) and (a)(2), and that any condition that involves a restriction of liberty must be reasonably necessary to the purposes of sentencing set forth in section 3553(a)(2). This language is designed to allay the fears of such disparate groups as the ACLU and the Business Roundtable that probation conditions might be too restrictive in a particular case or might involve more supervision than is justified by the case. The judge is limited in imposing conditions of probation to imposing only those that carry out the purposes of sentencing in a particular case. He cannot restrain the liberty of a defendant who does not need that level of punishment or incapacitation, nor can he place business conditions on an organization that are unrelated to the purposes of sentencing for the offense of which the organization is convicted. It is not the intent of the Committee that the courts manage organizations as a part of probation supervision, but it is the intent of the Committee that all necessary conditions that are related to the characteristics of the offense and the offender and that are directed to the purposes of sentencing be imposed.

Proposed 18 U.S.C. 3563(c) provides that the court, after a hearing,[218] may, pursuant to the provisions applicable to the initial setting of conditions of probation, modify, reduce or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation. This provision brings forward the substance of current law (18 U.S.C. 3651) and Rule 32.1(b) of the Federal Rules of Criminal Procedure. It enables the court to adjust the conditions of probation to the changed circumstances of the defendant.

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[218] See *Skipworth* v. *United States*, 508 F.2d 598 (3d Cir. 1975).

The requirement in proposed 18 U.S.C. 3563(d) that the court direct the probation officer to provide to a defendant a written statement that sets forth the conditions of a sentence of probation with sufficient clarity and specificity that it can serve as a guide for the defendant's conduct and for such supervision as is required, is new to Federal law.[219] The Committee believes, however, that such a statement should be required both as a matter of fairness and as a matter of efficient program administration.[220]

SECTION 3564. RUNNING A TERM OF PROBATION

1. In general

This section governs the commencement of a term of probation, the effect of other sentences upon the running of the term, and the court's power to terminate or extend a term of probation.

2. Present Federal law

While the probation provisions of current title 18 are silent as to when a term of probation commences, the courts have held that, unless another time is specified in the order, it begins when the judge imposes sentence.[221] Rule 38(a)(4) of the Federal Rules of Criminal Procedure provides that if the order placing the defendant on probation is not stayed, the court shall specify when the term of probation shall commence.

The provisions of the current statutes are also silent with regard to the running of multiple terms of probation. Where the question has arisen, the courts have held that such terms may be consecutive but may not exceed the maximum term of five years provided by 18 U.S.C. 3651.[222] If, however, the court has not specified whether two terms of probation are to run consecutively or concurrently, it has been held that the presumption is that they run concurrently.[223]

The current statutes do not specify whether a term of probation can run concurrently with a sentence of imprisonment. While most courts have held that probation is tolled by a sentence of imprisonment,[224] at least one court has held that incarceration for an offense committed prior to the imposition of probation does not toll the term of probation.[225]

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[219] See *Zaroogian* v. *United States*, 367 F.2d 959 (1st Cir. 1966); *McHugh* v. *United States*, 230 F.2d 262 (1st Cir.), cert. denied, 351 U.S. 955 (1956).

[220] An error in the recitation of conditions in the statement, or even an accidental failure to supply such a statement, should not necessarily be construed as a reason to impugn the propriety or validity of a decision to revoke or modify the probation because of a breach of a condition actually imposed, since the court will have stated those conditions during the sentencing proceeding in any event.

[221] *Gaddis* v. *United States*, 280 F.2d 334 (6th Cir. 1960); *Davis* v. *Parker*, 293 F. Supp. 1388 (D.C. Del. 1968).

[222] *United States* v. *Pisano*, 266 F. Supp. 913 (E.D. Pa. 1967). But see *United States* v. *Lancer*, 361 F. Supp. 129 (E.D. Pa. 1973), vacated and remanded on other grounds, 508 F.2d 719 (3d Cir. 1975), cert. denied, 421 U.S. 989, in which the court held that, where two indictments were consolidated at the defendant's request, the court could impose two consecutive terms of probation that totalled in excess of five years.

[223] *Engle* v. *United States*, 332 F.2d 88 (6th Cir. 1964), cert. denied, 379 U.S. 903.

[224] *U.S. ex rel Demarois* v. *Farrell*, 87 F.2d 957 (10th Cir.), cert. denied, 302 U.S. 683, rehearing denied, 302 U.S. 775 (1937); *Ashworth* v. *United States*, 392 F.2d 245 (6th Cir. 1968).

18 U.S.C. 3653 grants discretion to a court, upon review of a probationer's conduct, to discharge the probationer from supervision and terminate the proceedings against him, or to extend the term of probation. However, the authority to extend the term of probation is subject to the five-year limitation contained in 18 U.S.C. 3651.[226]

3. Provisions of the bill, as reported

Subsection (a) of proposed 18 U.S.C. 3564 provides that the term of probation commences on the day the sentence of probation is imposed, unless otherwise ordered by the court.

Subsection (b) provides that multiple terms of probation are to run concurrently, regardless of when or for what offenses or by what jurisdiction they are imposed, and that a term of probation is to run concurrently with a term of supervised release. Consequently, unlike the situation under current law, consecutive terms of probation may not be imposed. Of course, if a defendant is sentenced to terms of probation for offenses of varying seriousness, the maximum term of probation would be measured according to the term for the most serious offense. This subsection also makes it clear that probation does not run during any period in which the defendant is incarcerated for a period of at least 30 consecutive days in connection with a Federal, State or local criminal conviction.

Subsection (c) authorizes the court, after considering the factors set forth in section 3553(a), to terminate a term of probation and to discharge the defendant prior to its expiration at any time in the case of a misdemeanor or an infraction or at any time after one year in the case of a felony, if the conduct of the defendant and the interest of justice warrant such action. While current law[227] permits such early termination at any time without regard to the degree of the offense, it appears appropriate to retain the court's jurisdiction over an offender convicted of a felony for at least a one-year period. If the court determines that an offender does not need active supervision, it may impose only the least onerous discretionary conditions of probation that it decides to be advisable, or may permit the probationer to remain at liberty subject only to the conditions that he not commit another offense and, if he is convicted of a felony, that he pay a fine or restitution, or engage in community service.[228]

Subsection (d) authorizes the court, after a hearing and pursuant to the provisions applicable to the initial setting of the term of probation, to extend a term of probation, at any time prior to its expiration or termination, unless the maximum term was previously imposed. This provision is necessary, the Committee believes, to encourage judges to initially impose what appears to be the most appropriate length for the term of probation. If judges feared that a term would later be found to be too short and that the court would be powerless to extend it, they might well feel constrained to impose the maximum term in all cases.

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[225] *United States* v. *Pisano, supra* note 222.

[226] *United States* v. *Edministon*, 69 F. Supp. 382 (W.D. La. 1947); *United States* v. *Buchanan*, 340 F. Supp. 1285 (E.D. N.C. 1972).

[227] 13 U.S.C. 3653.

[228] See proposed 18 U.S.C. 3653(a).

Subsection (e) provides that a term of probation remains subject to revocation during its continuance.

SECTION 3565. REVOCATION OF PROBATION

1. In general

This section provides that probation may be revoked if the defendant violates a condition of probation, and specifies the period during which such revocation may take place.

2. Present Federal law

18 U.S.C. 3653 provides that during the term of probation a probationer may be arrested by his probation officer without a warrant "for cause." It further provides that during the maximum term permitted by section 3651 (five years) the court may issue a warrant for the arrest of the probationer for a violation of a condition occurring prior to expiration of the term imposed. After arrest, the probationer must be taken as speedily as possible before the court having jurisdiction over him, whereupon the court may revoke probation and reinstate the sentence originally imposed, impose a lesser sentence, or, if imposition of the sentence was suspended, impose any sentence which could have been imposed at the time of the judgment or conviction. Rule 32.1 of the Federal Rules of Criminal Procedure outlines the rights of the defendant at the revocation hearing, including notice of the alleged violation, disclosure of evidence, an opportunity to appear and present evidence, right to counsel, and opportunity to question witnesses against him. The courts have held that after revocation of probation, no further probation may be ordered.[229]

3. Provisions of the bill, as reported

Section 3565(a) provides that if a defendant violates a condition of probation the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, either continue the defendant on the sentence of probation, subject to such modifications of the term or conditions of probation as it deems appropriate, or may revoke probation and impose any other sentence which could have been imposed at the time of the initial sentencing. Provisions governing the arrest of a probationer are contained in proposed 18 U.S.C. 3606; provisions governing the hearing to be accorded the probationer are contained in Rule 32.1.[230] The Committee felt it appropriate to leave procedural provisions concerning probation revocation rights in Rule 32.1 where they will remain subject to periodic revision by the Judicial Conference of the United States, if necessary.

Section 3565(b) provides that revocation of probation or imposition of another sentence may occur after the term of probation has expired if a violation of a condition occurred prior to the expiration, if the adjudication occurs within a reasonable period of time, and if a warrant or summons on the basis of an allegation of such a violation was issued prior to the expiration of the term of probation. Thus, the section more narrowly restricts the time within which probation may be revoked than does current 18 U.S.C. 3653, which permits revocation at any time within the maximum period of five years regardless of the term initially imposed or the seriousness of the offense.

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[229] *Fox* v. *United States*, 354 F.2d 752 (10th Cir. 1965).

[230] See e.g., *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); see also *Morrisey* v. *Brewer*, 408 U.S. 472 (1972).

SECTION 3566. IMPLEMENTATION OF A SENTENCE OF PROBATION

This section, which has no counterpart in current law, merely directs attention to the fact that provisions governing the implementation of probation are contained in subchapter A of chapter 229.

SUBCHAPTER C—FINES

(Sections 3571-3574)

This subchapter sets the maximum monetary fines that may be imposed for the various levels of criminal offenses, specifies the criteria to be considered before imposition of fines, and provides for the subsequent modification or remission of fines previously imposed. In so doing, the bill makes major advances in using the mechanism of fines as an effective sanction for white collar crime and other highly profitable criminal offenses.

The Committee is of the view that fines generally have been an inappropriately under-used penalty in American criminal law, even though there are many instances in which a fine in a measured amount can constitute a highly effective means of achieving one or more of the goals of the criminal justice system. Part of the reason for the under-utilization of fines as a criminal sanction is the fact that the maximum levels of fines under current law, with rare exceptions,[231] are set so low that the courts are not able to use them effectively as a sentencing option. These statutory limits are largely the products of an earlier era when the average wage earner achieved a yearly income considerably lower than that common today, and when inflation had not yet reduced the value of currency to its present level.

There exists today the anomalous situation in which a typical felony may be punishable on the one hand by a maximum of five years' imprisonment, and on the other hand by a maximum fine of only $5,000 or $10,000.[232] Before the two facets of the stated penalty may be seriously considered as alternatives to one another, they must be of roughly equivalent severity. Yet today, five years of a person's freedom, even when measured according to the average individual's earning power alone, carries a value in excess of $50,000.

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[231] A dramatic exception is the provision of 21 U.S.C. 848 which permits a fine of $100,000 ($200,000 if the defendant is a recidivist) for the offense of operating a continuing drug-trafficking enterprise. Under this section, fines of up to $300,000 have been imposed on individuals under multiple-count indictments. See *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974). See also 15 U.S.C. 1, 2, and 3.

[232] Under most current law provisions, of course, such a statement of a penalty is usually not a recitation of two mutually exclusive alternatives: both the five-year maximum term of imprisonment and the $5,000 maximum fine may be imposed.

In a case in which a serious violation has occurred, but in which the court has found reason to explore alternatives to incarceration, the current state of the law needlessly hampers the court in its fashioning of an appropriate sentence. It is with the intent of enhancing the ability of the courts to fashion remedies appropriate to offenses by providing maximum fines at levels that are suitable to our times—and at levels that will help to eliminate the popular view that certain offenses will lead only to a nominal fine equivalent to a minor cost of doing business—that the Committee has drafted the provisions of the subchapter.

SECTION 3571. SENTENCE OF FINE

1. In general

Proposed 18 U.S.C. 3571 establishes the general statutory authority for the imposition of a fine as a penal sanction. The maximum amount of the fine that may be imposed in a particular case depends on whether the offense is classified as a felony, misdemeanor, or infraction; whether the offender is an individual or an organization; and, in the case of a misdemeanor, whether the offense resulted in loss of human life.

2. Present Federal law

Under the present Federal law, fines are specified as an authorized form of sentence for virtually all offenses. It is recognized that fines often represent the only useful sanction against corporations and other organizations, as well as being, in the view of many judges, the major acceptable penalty against significant numbers of individual Federal offenders. The authorized maximum limits, however, are generally very low. Complaints that current fine levels are insufficient to accomplish the purposes of sentencing are being voiced by Federal judges with increasing regularity.[233]

Present Federal law also includes large and logically inexplicable disparities in the levels of fines permitted as criminal sanctions for offenses of essentially similar natures. The following are examples.

A. Conspiracy to defraud the United States or to commit any offense against the United States is punishable by a maximum prison term of five years and by a fine of up to $10,000.[234] On the other hand, a conspiracy to prevent a person from accepting Federal office or to prevent a Federal official from discharging his duties, while graded more seriously in terms of the authorized maximum prison term, which is six years, carries a lesser maximum fine—$5,000.[235]

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[233] See the statement of Judge Renfrew of the Northern District of California in which he complains that the $50,000 maximum that he imposed in a price-fixing case was not sufficient under the circumstances and that "had the maximum been more than $50,000, the amount of the fines would have been substantially more as to all of the defendants * * * [H]ere, it seems to me, is a situation where clearly there's a need for increasing the amount of the fine." 16 Cr. L. Rptr. 2178, 2181 (Nov. 1974). See also the statement of Judge MacMahon of the Southern District of New York in which, upon imposing the maximum available fines of $75,000 on each of two millionaire defendants found guilty of evading $761,000 in taxes, he said that he regretted that the tax laws did not permit him to impose a higher fine on each defendant. New York Times, March 20, 1973, p. 26, col. 1. (Note too, that in each of these cases the fines available were substantially higher than those generally available in Federal criminal cases. Note also that the maximum fine levels for many antitrust offenses were substantially increased in the 94th Congress (15 U.S.C. 1, 2, and 3).)

[234] 18 U.S.C. 371.

[235] 18 U.S.C. 372.

B. Forgery of naturalization or citizenship papers carries the same maximum five-year prison term as does forgery of an entry visa, yet the former offense carries a maximum fine of $5,000 and the latter a maximum fine of only $2,000.[236] Moreover, another offense of this kind, falsification of an invoice by a consular official, carries a maximum prison term of three years and thus, presumably, is conceived to be a less serious offense than the two cited forgery offenses, yet it provides for a $10,000 fine.[237]

C. Robbery of a Federally insured bank is punishable by a fine of up to $5,000, as well as by a sentence to imprisonment.[238] Robbery of a post office must result in a term of imprisonment but cannot result in a fine.[239]

D. A postmaster who demands more than the authorized postage for mail matter and a vessel inspector who collects more than the authorized fee both are subject to a maximum prison term of six months. The vessel inspector can be fined up to $500, while the postmaster is subject to a maximum fine of only $100.[240]

E. One who injures property of the United States is subject to a fine of up to $10,000 if the damage exceeds $100, and a fine up to $1,000 if the damage is less than $100.[241] One who injures property of the United States on a wildlife refuge, no matter how much the damage, is subject to a maximum fine of only $500.[242]

F. A clerk of court who converts funds which have come into his hands by virtue of his official position may be punished by up to ten years' imprisonment if the amount exceeds $100.[243] Conversion by a clerk of court of funds which belong in the registry of the court also carries a maximum sentence of ten years in prison if the amount exceeds $100.[244] But in the former case a fine can equal double the amount converted, while in the latter a fine cannot exceed the amount converted.

3. Provisions of the bill, as reported

Subsection (a) authorizes the use of fines in criminal sentencing. There are no offenses for which a fine may not be imposed. As provided in section 3551(b) and (c), a fine may be imposed alone or in addition to any other sentence. Payment of a fine may also be made a condition of probation pursuant to section 3562(b)(2), or a mandatory condition of probation pursuant to section 3562(a)(2), so that revocation of probation is available as a means of enforcing the fine. A fine may also be made a condition of post-release supervision, permitting the court to hold a defendant in contempt if he fails to pay it.

Subsection (b) establishes the maximum limits of fines for felonies, misdemeanors, and infractions, except to the extent that a higher limit may otherwise be authorized in this chapter for the offense. The fine levels set forth in the subsection are considerably higher than those generally authorized by current law,[245] and are designed to establish an effective scale for pecuniary punishment and deterrence that will reflect current economic realities.[246] Penalties for organizations are set at higher levels than those for individuals, following the New York model,[247] in order to take cognizance of the fact that a sum of money that is sufficient to penalize or deter an individual may not be sufficient to penalize or deter an organization, both because the organization is likely to have more money available to it and because the sentence for an organization obviously cannot include a term of imprisonment.

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[236] 18 U.S.C. 1426; 18 U.S.C. 1546.
[237] 18 U.S.C. 1019.
[238] 18 U.S.C. 2113(a).
[239] 18 U.S.C. 2114.
[240] 18 U.S.C. 1726; 18 U.S.C. 1912.
[241] 18 U.S.C. 1361.
[242] 18 U.S.C. 41.
[243] 18 U.S.C. 645.
[244] 18 U.S.C. 646.

The fine levels in subsection (b) for felonies and misdemeanors committed by individuals and for felonies committed by organizations, are considerably higher than the levels provided in S. 1437 as passed by the Senate in the 95th Congress. In addition, subsections (b)(1)(A) and (b)(2)(A) were amended in the 96th Congress to provide the same maximum fine for a misdemeanor that results in the loss of life as for a felony. These amendments are designed to offset the deletion in the 96th Congress of section 2201(c) in S. 1437, which provided that, as an alternative to the maximum fines set forth in subsection (b), "[a] defendant who has been found guilty of an offense through which pecuniary gain was directly or indirectly derived, or by which bodily injury or property damage or other loss was caused, may be sentenced to pay a fine that does not exceed twice the gross gain derived or twice the gross loss caused, whichever is the greater." The business community expressed concerns that the standard for determining the amount of a fine under that provision could result in an unwieldy sentencing proceeding that would be virtually equivalent to a trial on the question of damages. The Committee concluded that an increase in the maximum fine levels for serious offenses could assure that a fine could be imposed that would usually reach the defendant's illgotten gains while avoiding undue complexity in the sentencing hearing. Of course, in a situation in which, for example, the defendant obtained millions of dollars in the course of committing an offense, the provisions for an order of restitution or an order of notice to victims may be used, depending on the circumstances, in conjunction with a fine to assure that a convicted defendant cannot keep what he obtained.

It is intended by the Committee that the increased fines permitted by this section will help materially to penalize and deter white collar crime and other highly profitable crime. Certainly no correctional aims can be achieved where the maximum sentence imposable is set at such a low level that it can be regarded merely as a cost of doing business—a cost that may in fact be more than offset by the gain from the illegal method of doing business. The need for such increased penalties is particularly apparent with regard to a corporate defendant which today can often divide the minor burden of payment among its many stockholders, or pass it on to consumers as a cost of doing business, with the result that lesser penalties may not be felt either by the corporation or by its multiple owners.

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[245] See discussion of proposed 18 U.S.C. 3559(b).

[246] Such substantially higher fine levels were recommended by, *inter alia*, the Committee on Reform of Federal Criminal Laws of the American Bar Association, Subcommittee Criminal Code Hearings, Part VII, 5817.

[247] McKinney's N.Y. Crim. Law § 400.30 (1969).

While the Committee believes that the increased fine levels will be of particular importance in the white collar crime area, it does not mean to imply that fines are not an important aspect of sentencing in other areas as well. It is hoped that the sentencing provisions will lead to more creative use of sentencing options such as, for example, the use of a sentence to pay a fine in installments over a period of time for minor offenders who may not be able to pay a fine in a lump sum. Such a sentence would be appropriate, for example, in the case of a defendant without current assets who is convicted of a minor offense that does not warrant imprisonment but that nevertheless must be met by some clear form of punishment and deterrence.

SECTION 3572. IMPOSITION OF A SENTENCE OF FINE

1. In general

Section 3572 sets out factors that the court must consider in imposing a fine, specifies the degree to which a sentence to pay a fine is final, places a limit on the aggregation of multiple fines, provides that the court may specify the time and method of payment of the fine, precludes the imposition of an alternative sentence to be served if an imposed fine is not paid, provides notice that agents of an organization who are authorized to disburse its assets are individually responsible for payment from the funds of the organization of the fine assessed against it, and provides that a fine imposed on an agent or shareholder of an organization may not be paid from the assets of the organization, unless expressly permissible under applicable State law.

2. Present Federal law

The provisions of this section generally are not the subject of any current Federal statutes, although imprisonment in lieu of the payment of a fine is inferentially authorized.[248]

3. Provisions of the bill, as reported

Subsection (a), by cross-reference to section 3553(a), specifies the factors to be considered by the court in determining whether to impose a fine, and in determining its amount, the time for payment, and the method of payment. As is the case with regard to other potential sanctions, the court is required to consider the nature and circumstances of the offense and the history and characteristics of the defendant, the purposes of sentencing with regard to which a fine may be an appropriate response, and the guidelines and any policy statements which may be applicable. Use of the qualifier "to the extent that they are applicable" in referring to the four stated purposes of sentencing is intended as recognition that a fine may often be a highly useful means of providing just punishment and of deterring others from engaging in like offenses—particularly offenses affording the opportunity for monetary gain—while the other purposes of sentencing would less commonly be served by a sentence to pay a fine.

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[248] See 18 U.S.C. 3565. But see *Tate* v. *Short*, 401 U.S. 395 (1971); *Williams* v. *Illinois*, 399 U.S. 235 (1970).

In considering the characteristics of the defendant, the court is specifically required to consider the ability of the defendant to pay a fine in the amount and manner contemplated in view of the defendant's income, earning capacity, and financial resources, and, if the defendant is an organization, the size of the organization. The court is also required to consider the burden that the fine will place on the defendant and on his dependents, any payment of restitution by the defendant or any requirement that the defendant make reparation to the victim, the impact of the fine on the future financial stability of the defendant, any effort by an organizational offender to discipline the persons responsible for the offense or ensure against recurrence of the offense, and any other equitable considerations that are pertinent.

The maximum fine levels are sufficiently high to permit considerable flexibility in tailoring the fine level to the situation in a particular case. While it is not intended that a fine for a solvent individual be so high as to force him into a lifetime of poverty, if a defendant is wealthy and the court finds that a high fine is necessary to serve the purposes of sentencing, it should not be reluctant to sentence the defendant to pay a high fine. On the other hand, the court need not avoid the use of a sentence to pay a fine against an individual who is not wealthy since the bill would permit installment payments of a fine. In some cases, the most appropriate sentence might be, for example, the payment of a fairly substantial fine in installments of a specified amount out of each pay check over a period of time.

The requirement that the court, in assessing the ability of a defendant to pay a fine, consider any payment of restitution by the defendant or any requirement that the defendant make restitution to the victims of the offense is not intended necessarily to result in the court's avoiding imposition of a fine that might otherwise be imposed or reducing a fine by the amount of restitution to be paid. Either of these results might, however, be appropriate in a particular case, depending upon the effect of payment of restitution upon the defendant's ability to pay a fine and upon the purposes of sentencing to be served by requiring payment of a particular fine. Of course, if the defendant has, prior to sentencing made reparation or made arrangements to make reparation to the victims of his offense, this will have an effect on his financial resources which should be taken into account in assessing the ability of the defendant to pay a fine, and may also alleviate somewhat the need to impose a high fine for purposes of punishment and deterrence.

The considerations in setting fine levels can obviously be quite complex, and they warrant careful attention by the Sentencing Commission in formulating sentencing guidelines and policy statements to aid in imposing sentence.

Subsection (b) was included for the first time in S. 1630 in the 97th Congress. It provides that, unless otherwise expressly permitted, the aggregate of fines that may be imposed on a defendant at the same time for offenses that arise from a common scheme or plan and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense. The provision was added in response to concerns that there might be some offenses, particularly regulatory offenses, where an ongoing pattern of conduct constituted numerous minor offenses, with the result that the defendant might be subject to an unjustifiably high maximum fine.

Subsection (c) makes clear that, even though a fine imposed by the sentencing judge may be modified or remitted pursuant to section 3573, corrected pursuant to section 3742, or appealed and modified pursuant to section 3742 if it is outside the guidelines, the judgment of conviction that includes a fine is final for all other purposes. This notes the provisional nature of the sentence pending any later modifications authorized by the bill while making clear that the conviction is otherwise final.

Subsection (d) permits the court to authorize payment within a specified period of time or in installments. Such flexible payment schedules are now specifically authorized in the Federal system for a fine imposed as a condition of probation,[249] and are authorized in many States.[250] Clearly, if the defendant can earn the money to pay a certain fine over a period of time, there seems little justification for choosing imprisonment or a lesser fine if the higher fine would otherwise be clearly the most appropriate sentence.

Subsection (e) prohibits imposition, at the time the sentence to pay a fine is imposed, of an alternative sentence to be served if the fine is not paid. If the defendant fails to pay his fine, the court may determine the remedy after the nonpayment and after an inquiry into the reasons for it.[251] If, for example, nonpayment has occurred because changes in the defendant's financial circumstances have made payment an undue financial burden, it may be necessary to adjust the amount of the fine pursuant to the provisions of section 3573. If, on the other hand, the defendant is able to pay the fine but chooses to ignore his legal obligation to pay it, the provisions of proposed subchapter B of chapter 229 regarding collection of fines may be utilized to collect the fine.

Subsection (f) specifies that, if an organization is fined, it is the duty of each of the organization's employees or agents who is authorized to make disbursement of the organization's assets to pay the fine from organization assets. This provision is designed to assure that a corporation will not be able to escape or delay liability by means of obfuscating the nature of its structure.[252] The subsection also precludes the payment of a fine imposed on an agent or shareholder of an organization from assets of the organization unless such payment is expressly permissible under applicable State law. The purpose of the exception is simply to recognize that the governing of internal corporate operations is appropriately a matter for the law of the State of incorporation. Most States, the

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[249] 18 U.S.C. 3651.

[250] National Commission on Reform of Federal Criminal Laws, II *Working Papers* 1285 (1970).

[251] This is in opposition to the existing statute, 18 U.S.C. 3565, but in line with constitutional requirements. See *Williams* v. *Illinois, supra* note 248. There is no constitutional prohibition against imposing a new sentence, including a sentence to imprisonment in some circumstances, in the event a fine is not paid, even if the non-payment is without fault on the defendant's part, see *Bearden* v. *Georgia,*—U.S.—(decided May 24, 1983), but the Committee has not incorporated such procedure into the provisions of this bill.

[252] The Committee had considered including specifically in this subsection a reference both to the disbursing officers of the organization and "their superiors." It was decided, however, that such a reference to "superiors" would be redundant since whatever authority a disbursing officer or cashier would have, would also be within the authority of every individual from his immediate superior through the chief executive officer.

Committee understands, carefully circumscribe indemnification for fines. The term "expressly permissible" is intended to distinguish between situations in which State statutes or court decisions authorize indemnification and those in which State law prohibits it or is silent. The court's finding is to extend only to that issue. If indemnification is authorized, State law governs the manner of determining whether it is proper in a particular case.

SECTION 3573. MODIFICATION OR REMISSION OF FINE

1. In general

Section 3573 provides the flexibility necessary to accommodate changes in the financial condition of a defendant. Since section 3572 specifies that the ability of a defendant to pay is relevant to the amount of a fine, a modification or remission of the fine should be available when that ability changes. The court is thus equipped to adjust the fine of the well-intentioned defendant in order to avoid creating unjustifiable impoverishment. An unexcused failure to pay a fine, however, may be prosecuted as any other criminal contempt.[253]

2. Present Federal law

There is no counterpart to this section in existing Federal law; as previously noted, the current statute permits a judgment in a criminal case to require imprisonment until the fine is paid.[254]

3. Provisions of the bill, as reported

Subsection (a) permits a defendant who has been sentenced to pay a fine to petition the court for changes in the terms of payment or remission of all or part of the fine in specified circumstances. Under paragraph (1), if a defendant has paid part of a fine and if the circumstances that justified imposition of the fine in a particular amount or payment by a particular time or method have changed, the defendant may petition the court for modification of the method of payment, remission of all or part of the unpaid portion of the fine, or a change in the time or method of payment. The provision recognizes that the defendant's circumstances may change in a way that causes the amount or method of payment of a fine to become too harsh to serve the purposes of sentencing fairly. Paragraph (2) permits a defendant who has voluntarily made restitution to the victim of his offense after a fine was imposed to petition the court for a reduction of the fine in an amount not exceeding the amount of restitution. This provision places the defendant who voluntarily makes restitution after a fine is imposed on the same financial footing as the defendant who voluntarily makes restitution before sentencing or who is ordered to make restitution as part of his sentence.[255]

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[253] See 18 U.S.C. 402. It should also be pointed out that the unexcused failure to pay a fine in the time and manner specified may, if payment was made a condition of probation, result in a revocation of probation and the imposition of any other sentence that originally was available. See proposed 18 U.S.C. 3563(b)(2) and 3565(a)(2).

[254] 18 U.S.C. 3565.

[255] Proposed 18 U.S.C. 3572(a)(3).

Subsection (b) permits the judge to enter an appropriate order if the circumstances warrant relief. Of course, the considerations set forth in section 3572(a) for the setting of the initial fine and its time and method of payment are equally applicable to a determination whether a remission of the fine or a change in the time or method of payment is warranted.

These provisions allow the reasonable implementation of the underlying principles of this chapter, as suggested by the American Bar Association,[256] the Model Penal Code,[257] and several State statutes.

SECTION 3574. IMPLEMENTATION OF A SENTENCE OF FINE

Section 3574 notes that implementation of a sentence to pay a fine is governed by the procedures outlined in subchapter B of chapter 229 of title 18. Full discussion of these procedures is contained in the report on that subchapter.

SUBCHAPTER D—IMPRISONMENT

(Sections 3581–3586)

Proposed subchapter D of chapter 227 of title 18, United States Code, sets forth the basic considerations governing the imposition of sentences of imprisonment. It creates the frame of reference used throughout the sentencing provisions to determine the maximum sentence that may be imposed for each offense. It deals specifically with the terms of imprisonment and supervised release authorized for the various grades of offenses; criteria for imposing such sentences; collateral aspects of sentences of imprisonment; operation of multiple sentences; and calculation of terms of imprisonment.

SECTION 3581. SENTENCE OF IMPRISONMENT

1. In general

Section 3581 provides that a defendant convicted of an offense may generally be sentenced to a term of imprisonment, establishes the classes of offenses, and specifies the maximum authorized term of imprisonment for each class.

2. Present Federal law

Present Federal criminal law, which has grown by sporadic addition and deletion, has resulted in there being authorized in current title 18 at least seventeen levels of confinement, ranging from life imprisonment to thirty days. By combining imprisonment and fine variations, some seventy-five different punishment levels may be isolated. Comparison of punishment provisions for particular offenses leads to the exposure of numerous apparent inconsistencies.

In addition to the sentencing provisions found in the text of each individual criminal statute there are two generally applicable special offender sentencing provisions in current law.[258] These two provisions allow a term of imprisonment "for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law" for a special offender in certain clearly defined instances. Both require notice and a hearing with rights of counsel, confrontation, and compulsory process if application of the special offender sentence is sought by the prosecutor, and a sentence pursuant to the provisions may be appealed by the defendant or the government.[259]

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[256] ABA Standards Relating to the Administration of Justice, Sentencing Alternatives and Procedures, § 18-7.4 (1979).

[257] Model Penal Code § 302.3 (P.O.D. 1962).

[258] 18 U.S.C. 3575 and 21 U.S.C. 849.

A defendant sentenced to a term of imprisonment in excess of one year is eligible for release on parole during at least the last two-thirds of the sentence. The time at which a prisoner is eligible for release on parole is determined pursuant to the provisions of 18 U.S.C. 4205, which provides three possible actions by the sentencing judge that will affect a convicted defendant's parole eligibility date. First, if the judge specifies no parole eligibility date, a prisoner sentenced to a term of imprisonment that exceeds one year will be eligible for parole under 18 U.S.C. 4205(a) after serving one-third of the term or ten years, whichever is less. Second, under 18 U.S.C. 4205(b)(1), the judge may specify a time for parole eligibility that occurs before the time that would apply under 18 U.S.C. 4205(a). Third, under 18 U.S.C. 4205(b)(2), the judge may specify that the defendant will be immediately eligible for parole, and specify only the maximum term of imprisonment.[260]

In addition, the Parole Commission has in recent years used parole guidelines that recommend an appropriate length of time to be spent in prison by a defendant who was convicted of a particular crime and who has a particular history and characteristics.[261]

As presently structured, the laws concerning the imposition of a term of imprisonment and the determination of a date for parole eligibility often are not only incompatible but also work to promote disparity and lack of certainty in the criminal justice system. If a sentencing judge wishes to assure that he has a high degree of control over the time a defendant will actually spend in prison, he must not only determine what that period of time is, but must also evaluate the effect that the parole eligibility statute and the parole guidelines will have on the sentence that he imposes. If, for example, a judge believes that a defendant should spend 20 months in prison, less good time, for a robbery offense that carries a maximum term of imprisonment of 15 years,[262] committed under mitigating circumstances, he could achieve that result under current law by sentencing him to exactly 20 months imprisonment, but could achieve the result only because the existing parole guidelines do not recommend parole during such a short period. If, instead, he tried to achieve that result by sentencing the defendant to 60 months in prison, with eligibility for parole in one-third that time pursuant to 18 U.S.C. 4205(a), in the belief that most prisoners are released on parole at their parole eligibility date, the result would probably be that the defendant would spend at least 24 months in prison, the lowest period provided for robbery in the parole guidelines. Only if the Parole Commission agreed with the judge that there were particular mitigating circumstances not taken into account in the guidelines would the defendant serve the length of time that the judge intended.[263] On the other hand, if the judge thought the defendant should spend five years in prison, he would have to sentence the defendant to a 15-year term without early parole eligibility in order to assure that operation of the parole guidelines would not result in an earlier release from prison than the judge intended.[264] If the judge thought the defendant should serve seven years in prison, he could not control that result at all; such a sentence exceeds any period recommended in the parole guidelines for the offense of robbery (except for multiple offenses) and exceeds any period for which the judge could make the defendant ineligible for parole.

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[259] See *United States* v. *DiFrancesco*, 449 U.S. 117 (1980); *United States* v. *Neary*, 552 F.2d 1184 (7th Cir. 1977); *United States* v. *Stewart*, 531 F.2d 326 (6th Cir. 1976); *United States* v. *Ilacqua*, 562 F.2d 399 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

[260] In addition to the parole eligibility provisions for regular adult offenders, current law contains a number of specialized parole eligibility requirements. Those for youth offenders and young adult offenders included in 18 U.S.C. 5017 specify that a defendant sentenced to imprisonment under one of those provisions is eligible for parole immediately and must be released on parole at least two years before expiration of sentence, and those relating to persons sentenced under title II of the Narcotic Addict Rehabilitation Act in 18 U.S.C. 4254 specify parole eligibility after six months.

[261] The parole guidelines appear in 28 CFR § 2.20.

[262] See, e.g., 18 U.S.C. 2111 and 2112.

Thus, sentencing judges and the Parole Commission second-guess each other, often working at cross-purposes. The argument that early release on parole should be retained to help alleviate judicial sentencing disparity fails to take into account the fact that it is the very availability of such release that helps to create that disparity. The judges are attempting to apply their individual sentencing philosophy to control the true sentence of the defendant, while the Parole Commission is attempting to alleviate the resulting disparity. Obviously neither is successful under current law. The problem is compounded by the fact that the judges do not generally state reasons for their sentences or the lengths of time they believe defendants should actually spend in prison, effectively precluding the Parole Commission from evaluating the judges' views, to the extent it might find them pertinent, as to the influencing factors in particular cases.

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3581(a) states the general rule that all individual offenders, regardless of the type of offense committed, may be sentenced to a term of imprisonment.[265] This differs slightly from the approach taken by the National Commission in that the Commission's sentencing provisions did not provide for imprisoning persons committing the lowest class of offenses.[266] The Committee is of the belief that a very short term (five days) of imprisonment is appropriate for some offenders who are found to have committed infractions since, inter alia, the shock value of a brief period in prison may have significant special deterrent effect.

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[263] It should be noted that even if the defendant who was sentenced to 60 months in prison had been made eligible for parole either at a designated time less than one-third the sentence or immediately upon commencement of sentence pursuant to 18 U.S.C. 4205(b), the application of the parole guidelines to the defendant usually would not be altered regardless of the judge's (usually unstated) purpose in specifying early parole eligibility.

[264] While the parole guidelines do provide that the worst two groups of offenders who commit robbery should spend from 48 to 72 months in prison, the Parole Commission's conclusions as to which prisoners would fall within those groups might differ from those of the sentencing judge.

[265] That rule is subject to limited exceptions. If an offense is not punishable under current law by a term of imprisonment, it will not be punishable by imprisonment under proposed 18 U.S.C. 3559.

[266] National Commission Final Report, *supra* note 1, § 3201.

Subsection (b) sets forth nine classes of offenses.[267] There are five felony classes with authorized terms of imprisonment ranging from life imprisonment to three years; three misdemeanor classes with maximum terms ranging from one year to thirty days; and the aforementioned infraction category carrying a maximum of five days. This categorization of offenses accords fairly closely with the range and number of categories adopted in several recent State codifications, and, except for the addition of a three-year felony and a six-month misdemeanor, accords closely with the recommendation of the National Commission.[268]

It must be remembered that the terms set forth are the maximum periods for which a judge is authorized to sentence an offender in each such category; they represent the Committee's judgment as to the greatest period the Congress should allow a judge to impose for an offense committed under the most egregious of circumstances. It should also be remembered that the Sentencing Commission will be promulgating guidelines that will recommend an appropriate sentence for a particular category of offender who is convicted of a particular category of offense and that the guidelines would reserve the upper range of the maximum sentence for offenders who repeatedly commit offenses or those who commit an offense under particularly egregious circumstances.[269] It is expected, for example, that the ordinary sentence imposed for a Class C felony will be considerably less than the twelve-year maximum authorized. This subsection is designed simply to provide a maximum limit on the broad range within which the Sentencing Commission and the judges are to operate. The subsection is no more intended to indicate the actual sentence a judge is expected to impose in each case than are the analogous provisions of current Federal statutes that also customarily set forth only the maximum limit on the judge's discretion. Further, for the first time in Federal criminal law, the sentencing judge will be sentencing within the maximum permissible term of imprisonment after consideration of sentencing guidelines that will recommend the top of the possible sentencing range only for the most egregious cases, and the defendant will be able to obtain appellate review of the sentence if it exceeds the guideline range applicable to him.[270]

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[267] Proposed 18 U.S.C. 3559 specifies how these grades apply to offenses that specify a maximum term of imprisonment rather than a grade.

[268] The National Commission in its Final Report proposed generally higher terms of imprisonment for felonies since it retained parole; it proposed a supergrade category of felony permitting life imprisonment (§ 3601); three other classes of felonies, entailing imprisonment for thirty, fifteen and seven years (§§ 3002 (1); 3201 (1)); two categories of misdemeanors, carrying one year of imprisonment and thirty days' imprisonment (§§ 3002 (2); 3201 (2)); and one infraction category (§ 3002 (3)). Under the Commission's proposed formulation, with the lowest felony carrying a maximum of seven years, many offenses presently carrying two to five years maximum prison terms would either have to be upgraded to six-year felonies or reduced to one-year misdemeanors. To avoid a six-fold jump in potential penalty between one offense category and the next higher category, the Committee felt it appropriate to include a three-year felony, in accord with the recommendation of the cognizant committee of the American Bar Association that there not be a gap in possible maximum sentences from a one-year maximum to a maximum several times as high. Subcommittee Criminal Code Hearings, Part VII, at 5816. Similar considerations dictated the inclusion of a six-month misdemeanor.

[269] Proposed 28 U.S.C. 994(h) requires that the guidelines specify a sentence at or near the maximum provided in proposed 18 U.S.C. 3581(b) for a third conviction of a crime of violence or drug trafficking offense. Proposed 28 U.S.C. 994(i) requires that the guidelines specify a substantial term of imprisonment for other specific categories of very serious offenses. See Subcommittee Criminal Code Hearings, at Part XI, at 7814 (statement on behalf of the National League Aid and Defenders' Association); ABA Standards Relating to Sentencing Alternatives and Proceedings, § 18-2.1(e) (Second Edition Tentative Draft 1979).

A sentence imposed by a judge pursuant to section 3581 will represent the actual period of time that the defendant will spend in prison, except that a prisoner, after serving one year of his term of imprisonment, may receive credit at the end of each year of up to 36 days per year toward service of his sentence if he satisfactorily complies with the institution's rules.[271] The use of such "determinate" sentences, as noted earlier, represents a substantial departure from the sentencing philosophy on which current law is based. At the time the original parole statutes were drafted a judicial sentence was to represent only the maximum term that a defendant was to remain incarcerated, and the role of the Parole Commission was to determine when in the course of that incarceration the defendant had become sufficiently rehabilitated to be safely returned to society. While—for the reasons stated previously—the rehabilitation model is no longer the basis of the parole release decision, the theory on which it is based still pervades the existing Federal sentencing statutes. Under current law, if a judge sentences a defendant to a term of imprisonment that exceeds one year in length, that sentence will always result in the prisoner's being eligible for parole after serving one-third of the term, or less if the judge so specifies. In no case can the judge specify that, for example, a defendant should serve two years in prison and then be released for a transitional period of supervision. This is true even though logically the attributes of the entire sentence could be set at the time of sentencing—the factors routinely considered today by the Parole Commission in setting release dates[272] relate entirely to information known at the time of sentencing.[273]

The Committee is of the view, in light of the reasons that have been reviewed previously, that the indeterminate sentence no longer has a role to play in the context of a guideline sentencing system. The guideline sentencing system must totally supplant the indeterminate sentencing system in order to be successful. Accordingly, all sentences to imprisonment under the new system are determinate.

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[270] See proposed 18 U.S.C. 3742. There are two specialized provisions for appellate review of a sentence in current law: 18 U.S.C. 3576, relating to review of a sentence as a dangerous special offender, and 21 U.S.C. 849(h), relating to review of a sentence as a dangerous special drug offender.

[271] See proposed 18 U.S.C. 3624(b).

[272] The "salient factor score" set forth in 28 C.F.R. § 2.20, provides for consideration by the Parole Commission, in determining whether and when to release a prisoner on parole, of the number of prior adult or juvenile convictions and incarcerations of more than 30 days, the age at time of committing the current offense, recent period free of incarceration, whether the defendant was on parole or probation, or in confinement or escaped, at the time the offense was committed, and any history of heroin or opiate dependence.

[273] Only in some of those cases in which a hearing examiner sets a parole release date outside the Parole Commission guidelines, or in which a prisoner has a record of serious institutional rules violations, or in which there has been superior program achievement, may factors not known at the time of sentencing affect the release date. Hoffman and DeGostin, *Parole Decision Making: Structuring Discretion*, United States Board of Parole Research Unit, Report 5, Table II, at 11 (June 1974), set out in the Subcommittee Criminal Code Hearings, Part XIII, at 9217. In addition, 28 C.F.R. § 2.6 provides that, "[w]hile neither a forfeiture of good time nor a withholding of good time shall bar a prisoner from receiving a parole hearing, Sec. 4206 of Title 18 of the United States Code permits the Commission to parole only those prisoners who have substantially observed the rules of the institution."

It is the expectation of the Committee that determinate sentences imposed under this new sentencing system will not, on the average, be materially different from the actual times now spent in prison by similar offenders who have committed similar offenses. Logic and reason on the part of the Sentencing Commission, as reviewed and accepted by the Congress, will control the length of the recommended terms, but historical averages will be examined during their development.[274] There will be some logical changes from historical patterns, of course, as in the case of serious violent crimes or white collar offenses for which plainly inadequate sentences have been imposed in the past, and in the case of minor offenses for which generally inappropriate terms of imprisonment have been imposed in the past, but for the most part the average time served should be similar to that served today in like cases. Certainly the guidelines will remove from the criminal justice system the artificially high terms of imprisonment that are imposed today to take into account the effects of the parole laws on the time the defendant will serve. Both the offender and society will benefit.[275]

SECTION 3582. IMPOSITION OF A SENTENCE OF IMPRISONMENT

1. In general

This section specifies the factors to be considered by a sentencing judge in determining whether to impose a term of imprisonment and, if a term is to be imposed, the length of the term. The section also provides that, if a term of imprisonment is imposed, the judge may recommend a type of prison facility suitable for the defendant. The section also makes clear that a judgment of conviction is final even though the sentence is provisional in that it may be modified, corrected, or appealed, and describes the circumstances under which the term of imprisonment may be modified.

2. Present Federal law

At present there are no general Federal statutes prescribing factors that a judge must consider in deciding whether to sentence a defendant to a term of imprisonment and, if so, how long that term of imprisonment should be.

In addition, as noted before, the sentencing judge has very limited control under current law over the question of how long a defendant will actually spend in prison. The defendant whose sentence is more than a year long is eligible for release on parole by operation of law after serving one-third of the term of imprisonment or ten years, whichever is less,[276] unless the judge has specifically made him eligible for parole at an earlier time [277] or immediately upon commencement of service of sentence.[278] The law contains no statement concerning when the judge should specify early or immediate eligibility for parole. It also does not permit the judge in any case in which the term of imprisonment exceeds one year to make the defendant ineligible for parole for a longer period than one-third of his term of imprisonment.

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[274] See proposed 28 U.S.C. 994(m).

[275] The Sentencing Commission is required to take into account, inter alia, the nature and capacity of the existing penal and correctional facilities and services, as well as the purposes of sentencing, when it promulgates the sentencing guidelines. Proposed 28 U.S.C. 994(g). This requirement itself will help to avoid any unintended change in the actual median time spent in prison by Federal prisoners.

[276] 18 U.S.C. 4205(a).

[277] 18 U.S.C. 4205(b)(1).

[278] 18 U.S.C. 4205(b)(2).

There are several specialized sentencing statutes that provide some statutory guidance concerning the factors to be considered in imposing a sentence under their provisions. These statutes relate to dangerous special offenders, dangerous special drug offenders, youth and young adult offenders, and drug addicts.

Detailed criteria for a sentence to a term of imprisonment longer than that which would ordinarily be provided for many felonies are provided in 18 U.S.C. 3575 for "dangerous special offenders" and in 21 U.S.C. 849 for "dangerous special drug offenders." The criteria for the two classes of offenders are parallel, except that the dangerous special offender provisions may apply to any felony if the criteria are met, while the dangerous special drug offender provisions apply only to felonies involving controlled substances. In order for the dangerous special offender or dangerous special drug offender sentencing provisions to apply to a defendant, he must be found to be both "dangerous" and a "special" offender because he fits one of three classifications set forth in the statute. A defendant is considered "dangerous" if a period of confinement for a felony that is longer than the maximum provided in the statute defining the felony "is required for the protection of the public from further criminal conduct by the defendant."[279]

The dangerous special offender provisions apply to an offender who (1) was previously convicted of two or more separate felonies, and has either been convicted of the last one within five years of the current offense or been released from prison, on parole or otherwise, on one of the offenses within the past five years; (2) committed the charged felony as part of a pattern of criminal conduct which generated a substantial source of his income and in which he manifested special skills or expertise; or (3) committed the felony as part of, or in furtherance of, a conspiracy with three or more other persons in which the offender played or had agreed to play a leadership role, or in which he used, or had agreed to use, bribery or force. The classifications of dangerous special drug offenders are substantially the same, except that they relate only to persons charged with controlled substances felonies, and where the characterization of the offense is dependent on previous convictions, these convictions are for felonies involving controlled substances. Under either statute, the applicability to the defendant of the special offender classification must be established by a preponderance of the information, including information from the trial, the sentencing hearing, and the presentence report.

The Federal Youth Corrections Act[280] provides that a person who is under 22 years of age at the time of conviction may be sentenced under the Act under specified circumstances. Section 5010(d) of title 18 provides that a youth offender may be sentenced to a regular adult sentence if the court finds that he "will not derive benefit from treatment" under the Act. This provision has been interpreted by the Supreme Court to require that the sentencing court consider whether to sentence a youth offender pursuant to the Act but not to require that the court state reasons for deciding that it will or will not impose sentence under the Act.[281] If the court does sentence a youth offender under the Act, it may either sentence him to an indeterminate sentence for purposes of "treatment and supervision" [282] or, if it finds "that the youth offender may not be able to derive maximum benefit from treatment * * * prior to the expiration of six years," may sentence him to the custody of the Attorney General "for treatment and supervision" pursuant to the provisions of the Federal Youth Corrections Act to any "further period that may be authorized by law for the offense or offenses."[283]

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[279] 18 U.S.C. 3575(f); 21 U.S.C. 849(f).

[280] 18 U.S.C. 5001 et seq.

In both cases, the defendant is immediately eligible for parole.[284] In the case of an indeterminate sentence pursuant to 18 U.S.C. 5010(b), the defendant may spend no more than four years in prison and must be discharged unconditionally from supervision on or before six years from the date of his conviction.[285] If he is sentenced pursuant to 18 U.S.C. 5010(c) to a sentence that would apply to a regular adult offender, the defendant must be released on parole at least two years before the expiration of his sentence and must be released from supervision by the expiration of his term.[286]

If a defendant is a "young adult offender" between the ages of 22 and 26 at the time of conviction, the judge may, after considering his previous criminal record and record of juvenile delinquency, his background and capabilities, his physical and mental health, and "such other factors as may be considered pertinent," sentence him pursuant to the Federal Youth Corrections Act if he finds "that there are reasonable grounds to believe that the defendant will benefit from treatment" under the Act.[287] Unlike cases involving offenders under the age of 22,[288] the sentencing judge is not required to consider imposing sentence pursuant to the Federal Youth Corrections Act; rather, the sentencing judge has the option of imposing sentence pursuant to that Act in his discretion.

Finally, title II of the Narcotic Addict Rehabilitaion Act [289] provides that, if the court finds that an "eligible offender"[290] is an addict and "is likely to be rehabilitated through treatment," the court must sentence the defendant to the custody of the Attorney General for treatment unless the Attorney General certifies that adequate facilities and personnel for such treatment are not available.[291] Such a commitment is for an indeterminate period of up to ten years, but not "to exceed the maximum term of imprisonment" applicable to the offense. The defendant may be released on parole at any time after six months of treatment if the Attorney General recommends such release to the Board of Parole and the Surgeon General certifies "that the offender has made sufficient progress to warrant his conditional release under supervision."[292]

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[281] *United States* v. *Dorszynski,* 418 U.S. 424 (1974).

[282] 18 U.S.C. 5010(b).

[283] 18 U.S.C. 5010(c).

[284] 18 U.S.C. 5017(a).

[285] 18 U.S.C. 5017(c).

[286] 18 U.S.C. 5017(d).

[287] 18 U.S.C. 4216.

[288] See *United States* v. *Dorszynski, supra* note 281, which requires the judge to find that an offender under the age of 22 will receive no benefit from sentencing under the Youth Corrections Act, but does not require that the judge state reasons for his conclusion.

[289] 18 U.S.C. 4251 et seq.

[290] "Eligible offender" is defined in 18 U.S.C. 4251(f) to include any individual convicted of an offense against the United States except an individual whose conviction is for a crime of violence, or whose conviction is for trafficking in narcotic drugs (unless the offense was committed primarily to support the defendant's addiction), or against whom a felony charge is pending, or who is on probation or parole, or who has been convicted of a felony on two or more prior occasions, or who has previously been committed for narcotic addiction on three or more occasions.

3. Provisions of the bill, as reported

For the first time under Federal criminal law, a court would be required, pursuant to section 3582(a), to consider specified factors prior to the imposition of a sentence of imprisonment[293] in all cases in which a defendant was convicted of a Federal offense. The court must consider, to the extent that they are applicable,[294] the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to provide just punishment, a deterrent effect, incapacitation, and an opportunity for rehabilitation; and the guidelines and any policy statements of the Sentencing Commission that are applicable. While judges generally consider offense and offender characteristics in determining the type and length of sentence to be imposed under current law, the listing of the factors to be considered serves to focus attention on the specific purposes of the sentencing process and to assure that adequate emphasis is given to each. Again, it should be noted that there will be cases in which incarceration would be appropriate to serve only one or two of the listed purposes of sentencing; nevertheless, if imprisonment is found to be justified for any one of the purposes, except as noted below, its imposition is authorized under this section. In such a case, whether it should be imposed when authorized is a question to be resolved after balancing all the relevant considerations.

Subsection (a) specifies, in light of current knowledge, that the judge should recognize, in determining whether to impose a term of imprisonment, "that imprisonment is not an appropriate means of promoting correction and rehabilitation." This caution concerning the use of rehabilitation as a factor to be considered in imposing sentence is to discourage the employment of a term of imprisonment on the sole ground that a prison has a program that might be of benefit to the prisoner. This does not mean, of course, that if a defendant is to be sentenced to imprisonment for other purposes, the availability of rehabilitative programs should not be an appropriate consideration, for example, in recommending a particular facility.

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[291] 18 U.S.C. 4253(a).

[292] 18 U.S.C. 4254.

[293] The factors are required to be considered in determining whether a term of imprisonment should be imposed, in determining the appropriate length of any such term, and in determining whether it should be followed by a period of supervised release. The court is also required to consider policy statements issued by the Sentencing Commission in deciding whether to make a recommendation as to the appropriate type of prison facility for the defendant. See proposed 18 U.S.C. 3621(b).

[294] The phrase "to the extent that they are applicable" acknowledges the fact that different purposes of sentencing are sometimes served best by different sentencing alternatives.

The Committee believes that the guidelines provide an appropriate means for embodying the same considerations which are contained in current dangerous special offender statutes. Two provisions in the directives to the Sentencing Commission are designed to be used in their place. First, under proposed 28 U.S.C. 994(i), the Sentencing Commission is specifically directed to assure that the sentencing guidelines require a substantial term of imprisonment for categories of defendants in which the defendant has an extended criminal history, is a career criminal, or is engaged in racketeering in a managerial or supervisory capacity, or committed a violent felony while on release pending trial, sentence, or appeal from another felony charge or conviction. Second, proposed 28 U.S.C. 994(h) requires the sentencing guidelines to specify a term of imprisonment at or near the statutory maximum for a third conviction of a felony that involves a crime of violence or drug trafficking.

The bill, as reported, also drops the special sentencing provisions for youth offenders, young adult offenders, and drug addicts. Under the bill, as reported, the Sentencing Commission is required to consider what impact, if any, such characteristics of the defendant as his age and his physical condition, including drug dependence, should have on the appropriate sentence.[295] By including such considerations in the formulation of sentencing guidelines, uniform treatment of the characteristics for all defendants similarly situated will be promoted. In addition, the converse situation is also recognized; the bill places in 28 U.S.C. 994(j) a recognition that a young first offender, who has not committed a serious crime, ordinarily should not receive a sentence to imprisonment. The Committee believes that this approach to such factors as youth is far preferable to the approach in current law. While the Bureau of Prisons has found that it is better from the standpoint of both prisoners and the criminal justice system to have prisoners in different age groups in the same institution, providing separate wings within an institution for youthful offenders, some courts have recently held that the Youth Corrections Act requires that offenders sentenced under the Act must be housed in a manner that separates them entirely from adult offenders.[296] The Bureau of Prisons thus provides three separate institutions for these offenders despite its misgivings concerning the wisdom of doing so, both because the limited number of institutions for such offenders causes most of them to be incarcerated far from home and because an institution containing only youthful offenders tends to have more discipline problems than one with a variety of age groups.[297] The Committee shares these concerns and believes that these provisions should be deleted. The directive to the Sentencing Commission contained in proposed 28 U.S.C. 994(d) to consider the effect that age should have on sentences is sufficient to assure such specialized treatment as is desirable for this category of offenders.

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[295] Proposed 28 U.S.C. 994(d).

[296] *Watts* v. *Hadden*, 651 F.2d 1354 (10th Cir. 1981); *Dancy* v. *Arnold*, 572 F.2d 107 (3d Cir. 1978); *Brown* v. *Carlson*, 431 F. Supp. 775 (W. D. Wisc. 1977). But see, *Outing* v. *Bell*, F.2d 1144 (4th Cir. 1980).

[297] See Crime Control Act Hearings (statement of the Department of Justice, pp. 19–21).

Subsection (b) is added to make clear that a judgment of conviction is final even though it includes a provisional sentence that is subject to modification as described in subsection (c), subject to correction pursuant to proposed 18 U.S.C. 3742, or, if the sentence is outside the guidelines, subject to appeal and modification pursuant to proposed 18 U.S.C. 3742.

Subsection (c) provides that a court may not modify a sentence except as described in the subsection. The subsection provides "safety valves" for modification of sentences in three situations.

The first "safety valve" applies, regardless of the length of sentence, to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner. In such a case, under subsection (c)(1)(A), the Director of the Bureau of Prisons could petition the court for a reduction in the sentence, and the court could grant a reduction if it found that the reduction was justified by "extraordinary and compelling reasons" and was consistent with applicable policy statements issued by the Sentencing Commission.[298] (Subsection (c)(1)(B) simply notes the authority to modify a sentence if modification is permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.)

Another "safety valve," set forth in subsection (c)(2), permits the court to reduce a term of imprisonment, upon motion of the defendant or the Director of the Bureau of Prisons or on its own motion, if the term was based on a sentencing range in the applicable guideline that was lowered by the Sentencing Commission after the defendant's sentence was imposed and if such a reduction is consistent with applicable policy statements of the Sentencing Commission.

The value of the forms of "safety valves" contained in this subsection lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling reasons" and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.

Subsection (d) permits the court to order, in conjunction with a term of imprisonment, that a defendant convicted of a felony violation of the laws relating to organized crime or drug offenses, not associate or communicate with a specified person if there is probable cause to believe that association or communication with the person is for the purpose of continuing the defendant's participation in an illegal enterprise. The order may be issued at the time of sentencing or may be issued at a later date if the Bureau of Prisons or the United States attorney requests. The order may not extend to association or communication with the defendant's counsel. The purpose of the provision is to prevent the defendant from continuing his illegal activities from his place of confinement. The provision is similar in concept to the provision of section 3563(b) (7) that permits the court to order as a condition of probation or supervised release that a defendant not associate unnecessarily with a specified person. The provision is not intended to limit in any way the current authority of the Bureau of Prisons to take appropriate measures to control similar or related activities on the part of prisoners or otherwise to impose reasonable restrictions on association or communication by prisoners. This aspect of a sentence is not referred to in the provision relating to appellate review of sentence since the concerns with limitations on communications are constitutional concerns to be decided under existing law on constitutional grounds by the courts on a case-by-case basis.

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[298] This is similar to the authority of the Bureau of Prisons in 18 U.S.C. 4205(g) to file a motion with the court at any time to reduce the minimum term of a prisoner so that he can be paroled.

Two other points should be noted in conjunction with section 3582. First, in articulating for the first time a general philosophy of sentencing—embodying the concepts of deterrence, incapacitation, just punishment, and rehabilitation—the bill avoids the highly emotional past debate over whether or not there should be a general sentencing presumption either in favor of incarceration or in favor of probation. The approach taken in the bill is to avoid any general reference to either presumption and, instead, rely on the general purposes of sentencing, leaving to the specific guidelines promulgated by the Commission the issue of whether imprisonment in an individual case is appropriate or not. Second, it is, of course, apparent that the general purposes of sentencing, in and of themselves, will not solve the problem of disparity. Obviously, this section must be read in conjunction with the specific guidelines, and other provisions of the bill, which are designed to deal with the immediate practical problem of disparity.

SECTION 3583. INCLUSION OF A SENTENCE OF SUSPERVISED RELEASE AFTER IMPRISONMENT

1. In general

Proposed 18 U.S.C. 3583 is a new section that permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to impose as part of the sentence a requirement that the defendant be placed on a term of supervised release to be served after imprisonment.

2. Present Federal law

Under current law, both the length of time that a defendant may be supervised on parole following a term of imprisonment and the length of time for which a parolee may be reimprisoned following parole revocation are dependent on the length of the original term of imprisonment.

Under 18 U.S.C. 4210(a), a parolee remains in the legal custody and under the control of the Attorney General until the expiration of the maximum term or terms of imprisonment to which he was sentenced. Thus, the smaller percentage of his term of imprisonment a prisoner spends in prison, the longer his period of parole supervision. The jurisdiction of the Parole Commission may be terminated by operation of law at an earlier date under 18 U.S.C. 4210(b) if the defendant was released as if on parole at the end of his term of imprisonment less credit toward good time[299] and there are less than 180 days of the term of imprisonment remaining. Supervision may be discontinued before the termination of jurisdiction if, upon its own motion or motion of the parolee, the Parole Commission determines to terminate it before the statutory time.[300] The Parole Commission is required to review periodically the need for continued supervision,[301] and may not continue supervision for more than five years after the parolee's release on parole unless it makes a finding after a hearing "that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law".[302]

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[299] See 18 U.S.C. 4164.

Under current law, the question whether a defendant sentenced to a term of imprisonment in excess of one year will be supervised on parole following release is dependent on whether or not the defendant is released on good time or on parole with more than 180 days remaining of his prison term.[303] It is not dependent on whether the defendant needs supervision following release; a defendant who needs supervision may have had such a poor disciplinary record in prison that he has less than 180 days of good time; a defendant who needs no supervision may have served only one-third of an unusually long sentence.

Under present law, if a parolee violates a condition of parole that results in a determination to revoke parole, the revocation has the effect of requiring the parolee to serve the remainder of his original term of imprisonment, subject to periodic consideration for rerelease as required for any prisoner who is eligible for parole.[304]

Current law also contains two provisions that result in street supervision following confinement of a person sentenced to a period of confinement of less than a year. Under 18 U.S.C. 3651, a defendant who is convicted of an offense for which the maximum term of imprisonment is more than six months may be sentenced to a split sentence with no more than six months' imprisonment followed by probation. Under 18 U.S.C.4205(f), the sentencing judge may specify that a defendant sentenced to between six months and one year in prison will be released as if on parole (i.e., subject to street supervision) after serving one-third of the term.

3. Provisions of the bill, as reported

This section permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to include as part of the sentence a requirement that the defendant serve a term of supervised release after he has served the term of imprisonment. Unlike current parole law, the question whether the defendant will be supervised following his term of imprisonment is dependent on whether the judge concludes that he needs supervision, rather than on the question whether a particular amount of his term of imprisonment remains. The term of supervised release would be a separate part of the defendant's sentence, rather than being the end of the term of imprisonment. If the term of supervised release is longer than recommended in the applicable sentencing guidelines, the defendant may appeal it under proposed section 3742; if it is shorter, the government may appeal on behalf of the public.

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[300] 18 U.S.C. 4211(a). Parole Commission standards for determining whether to terminate supervision early are set forth in 28 C.F.R. § 2.43(e).

[301] 18 U.S.C. 4211(b).

[302] 18 U.S.C. 4211(c)(1).

[303] 18 U.S.C. 4164 and 4210(b).

[304] See 28 C.F.R. § 2.21 (1983).

Subsection (b) specifies the authorized maximum terms of supervised release, with the terms ranging from a maximum of one year for a defendant sentenced for a Class E felony or for a misdemeanor, to a term of not more than three years for a defendant released after serving a term of imprisonment for a Class A or B felony. The length of the term of supervised release will be dependent on the needs of the defendant for supervision rather than, as in current law, on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released.

Subsection (c) specifies the factors that the judge is required to consider in determining whether to include a term of supervised release as a part of the defendant's sentence, and, if a term of supervised release is included, the length of the term. The judge is required to consider the history and characteristics of the defendant, the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, the applicable sentencing guidelines and policy statements, and the need to avoid unwarranted sentencing disparity. The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release—that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.

Subsection (d) describes the conditions that the judge may impose on a person who is placed on supervised release. The court is required to order, as a condition of supervised release, that the defendant not commit another crime during the period of supervision. It may also order any of the conditions set forth as conditions of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers appropriate, if the condition is reasonably related to the history and characteristics of the offender and the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes of the defendant, and the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. Whatever conditions are imposed may not involve a greater deprivation of liberty than is necessary to protect the public and to provide needed rehabilitation or corrections programs, and must be consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

Subsection (e) permits the court, after considering the same factors considered in the original imposition of a term of supervised release, to terminate a term of supervised release previously ordered at any time after one year of supervised release; or, after a hearing, to extend the term of supervised release (if less than the maximum term was originally imposed); or modify, reduce, or enlarge the conditions of supervised release; or to treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of title 18. The court is also empowered by subsection (e)(3) to treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title and to carry out the appropriate contempt proceedings and sanctions as specified in 18 U.S.C. 401. It is intended that contempt of court proceedings will only be used after repeated or serious violations of the conditions of supervised release.

In past Congresses, the legislative history of the sentencing reform proposal has contemplated use of criminal contempt as a sanction for violation of conditions of post-release supervision. The Probation Committee of the Judicial Conference urged the Committee to expressly state the availability of this sanction in the legislation to avoid confusion, and the Committee has done so.

Subsection (f) requires the court to direct the probation officer to provide the defendant with a clear and specific statement of the conditions of supervised release.

In effect, the term of supervised release provided by the bill, takes the place of parole supervision under current law. Unlike current law, however, probation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it.[305] The term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment. Unlike a term of probation, however, the term of supervised release is not subject to revocation for a violation. Instead, for the usual violations, the term or conditons of supervised release may be amended pursuant to subsection (e). If the violation is a new offense, the defendant may, of course, be prosecuted for the offense or held in contempt of court for violations of the court order setting the conditions of supervised release. The Committee did not provide for revocation proceedings for violation of a condition of supervised release because it does not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because it believes that a more serious violation should be dealt with as a new offense. In the case of a serious violation, of course, the fact that a defendant is charged with a new offense committed while he was on release will be pertinent to the questions whether there is a risk of flight or danger to the community pending trial and what conditions might be imposed on his release.

SECTION 3584. MULTIPLE SENTENCES OF IMPRISONMENT

1. In general

This section provides the rules for determining the length of a term of imprisonment for a person convicted of more than one offense. It specifies the factors to be considered in determining whether to impose concurrent or consecutive sentences. It further provides that consecutive sentences, and any portions thereof during which the defendant is subject to early release, shall be treated as a single sentence for administrative purposes.

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[305] The functions of probation officers with respect to supervised release are described more fully in the discussion of proposed 18 U.S.C. 3603.

2. Present Federal law

There are no provisions of current law covering the contents of this section.[306] Existing law permits the imposition of either concurrent or consecutive sentences, but provides the courts with no statutory guidance in making the choice.[307] Terms of imprisonment imposed at the same time are deemed to run concurrently rather than consecutively if the sentencing court has not specified otherwise.[308] Exceedingly long consecutive terms commonly are avoided through the exercise of judicial restraint. A term of imprisonment imposed on a person already serving a prison term is deemed to be concurrent with the first sentence if the first sentence is for a Federal offense,[309] but is usually served after the first sentence if that sentence involves imprisonment for a State or local offense.[310]

3. Provisions of the bill, as reported

Proposed 18 U.S.C. 3584(a) provides that sentences to multiple terms of imprisonment may, with one exception, be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed while the defendant is serving another one. The exception is that consecutive terms of imprisonment may not, contrary to current law, be imposed for an offense described in section 1001 (Criminal Attempt) and for an offense that was the sole objective of the attempt. This limitation on consecutive sentences follows the recommendation of the National Commission.[311] Of course, if the attempt involved plans for a complex pattern of criminal activity and the defendant was convicted of attempting, conspiring, or soliciting such a pattern of activity, the fact that he was also convicted of completing one or more, but not all, the planned offenses would not preclude, under the provisions of section 3584(a), the imposition of consecutive terms of imprisonment.

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[306] 18 U.S.C. 4161, however, does deal with aggregating sentences for purposes of good time allowances, and 18 U.S.C. 4205(a) provides in effect for aggregation of sentences for purposes of determining the date of parole eligibility.

[307] See, e.g., *Pereira* v. *United States,* 347 U.S. 1 (1954), sustaining the imposition of consecutive sentences for conspiracy to commit mail fraud and that substantive offense.

[308] See *Borum* v. *United States,* 409 F.2d 433 (D.C. Cir. 1967), cert, denied, 395 U.S. 916 (1969).

[309] See *Subas* v. *Hudspeth,* 122 F.2d 85 (10th Cir. 1941). "Absent clear language to the contrary, it is presumed that sentences imposed on more than one offense at the same time, or at different times, will run concurrently." *Id.* at 87, citing *United States* v. *Daugherty,* 269 U.S. 360 and other cases.

[310] See *Larios* v. *Madigan,* 299 F.2d 98, 100 (9th Cir. 1962); *United States* v. *Harrison,* 156 F. Supp. 756 (D.N.J. 1957), which states the opinion that the rule set forth in note 309 does not apply where one sentence is imposed by a State court and one by a Federal one. *Id.* at 760. Some courts have held that the Federal courts do not have the authority to make a Federal sentence concurrent with a State sentence already being served since 18 U.S.C. 3568 specifies that the Federal term commences when the defendant is received by Federal authorities. See, e.g., *United States* v. *Segal,* 549 F.2d 1293. 1301 (9th Cir. 1977).

[311] See National Commission Final Report, *supra* note 1, § 3204(2)(b). Proposed 18 U.S.C. 2304(a) in S. 1722, 96th Congress, also contained a bar to imposition of consecutive sentences for a criminal conspiracy or solicitation of a crime and another offense that was the sole objective of the conspiracy or solicitation. This provision has been replaced by a directive to the Sentencing Commission in proposed 28 U.S.C. 994(*l*) that the guidelines reflect the "general inappropriateness" of such consecutive sentences.

The National Commission also specified that terms should not be consecutive in two other situations: that in which one offense is a lesser included offense of the other; and that in which one offense prohibits the same conduct as the other, where one statute describes the conduct generally and another statute describes the conduct specifically.[312] The Committee has not included the first of these provisions since it generally does not favor conviction for an offense and a lesser included offense. The second situation is covered in new 28 U.S.C. 994(u) in the form of guidance to the Sentencing Commission in promulgating policy statements for sentencing.

Proposed 18 U.S.C. 3584(a) also codifies the rule that, if the court is silent as to whether sentences to terms of imprisonment imposed at the same time are concurrent or consecutive, the terms run concurrently unless a statute requires that they be consecutive.[313] If, on the other hand, multiple terms of imprisonment are imposed at different times without the judge specifying whether they are to run concurrently or consecutively, they will run consecutively unless the statute specifies otherwise. This carries forward current law where both sentences are for Federal offenses, but changes the law that now applies to a person sentenced for a Federal offense who is already serving a term of imprisonment for a State offense.[314]

Subsection (a) is intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject. However, the Committee hopes that the courts will attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively. Ordinarily, under the guidelines system, if the court is sentencing for multiple offenses at the same time, the guidelines will specify an incremental penalty by which some portion of the sentence for the first offense is added to the sentence for each similar offense.[315] Thus, for example, if the term of imprisonment recommended in the guidelines for one offense is two years, the guidelines might recommend a sentence of two and a half or three years if the defendant was convicted of three or four such offenses. On the other hand, if the defendant was being sentenced at one time for two entirely different offenses committed at different times, the judge might think that adding the guidelines sentences for the offenses together was appropriate, and specify fully consecutive sentences rather than overlapping ones. Similarly, if the defendant was convicted of one offense that was committed in the course of another offense (for example, murder committed in the course of a civil rights violation), the judge might wish to assure that there was at least some additional sentence over what the sentence would have been for only one of the offenses—or the sentencing guidelines or policy statements might recommend adding the two sentences together in order to assure an appropriate sentence for all the criminal conduct of the defendant.

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[312] See National Commission Final Report, *supra* note 1, § 3204(2)(a) and (c).

[313] See, e.g., 18 U.S.C. 924(c).

[314] Thus, it is intended that this provision be construed contrary to the holding in *United States* v. *Segal, supra* note 310.

[315] Proposed 28 U.S.C. 994(*l*)(1).

Subsection (b) provides that in evaluating whether the sentences should run concurrently or consecutively, the court must consider the nature and circumstances of the offenses and the history and characteristics of the offender, the need for just punishment, deterrence, incapacitation, and rehabilitation, and the sentencing guidelines and any pertinent policy statements of the Sentencing Commission. It is anticipated that in certain situations a purpose of incapacitation alone might warrant imposition of consecutive terms of imprisonment, while in other situations other purposes of sentencing might mandate the imposition of concurrent terms. Correspondingly, although similar offenses committed in the course of a single criminal episode would ordinarily be appropriate subjects for concurrent sentences, there may be instances in which the just punishment purpose of sentencing might require the imposition of distinct, separately identifiable sentences for each of the particular offenses the defendant is found to have committed. More frequently, perhaps, multiple offenses will result in a base sentence for the first offense or for the most serious offense being added to an incremental sentence for each subsequent offense. The subsection simply serves to call attention to the fact that in this sentencing determination, as in any other sentencing determination, the principal focus should be upon the purposes to be served by the sentence, and that the sentence should be structured accordingly.[316]

Subsection (c) provides that consecutive terms of imprisonment shall be treated as an aggregate for administrative purposes, thus simplying administration.

SECTION 3585. CALCULATION OF A TERM OF IMPRISONMENT

1. In general

This section provides the method of calculating the onset of a term of imprisonment and contains provisions for crediting an offender for prior custody.

2. Present Federal law

Current Federal law on these subjects is contained in 18 U.S.C. 3568. That section provides that a term of imprisonment commences on the date that the offender is received at an institution for the service of his sentence or on the date he is taken into custody awaiting transportation to the place he is to serve his sentence. It further provides that the offender will receive credit for any time spent in custody in connection with the offense or acts for which the sentence was imposed.

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[316] The problem of determining whether to impose concurrent or consecutive terms of imprisonment is made even more acute by the fact that criminal conduct on the part of an individual often may be dissected into a number of Federal offenses as different jurisdictional bases provide authority for filing several charges for essentially the same course of conduct. For example, the mailing of fifty letters to effect a scheme to defraud technically constitutes the commission of fifty offenses for which separate charges could be brought and separate consecutive sentences imposed. This is an example of a problem in sentencing under Federal law that should be addressed by the Sentencing Commission's guidelines and policy statements.

3. Provisions of the bill, as reported

Subsection (a) of proposed 18 U.S.C. 3585 provides that the sentence commences on the date that the defendant is received in custody awaiting transportation to the facility in which he is to serve his sentence, or arrives voluntarily at such facility.[317] Current law language differs from subsection (a) by stating that a sentence begins from the date of receipt at a facility or, if he is committed to one facility to await transportation to another facility, on the date of receipt at the first facility. The Committee does not intend a different result by not specifically requiring that the defendant be committed to the facility from which he will be transported.

The Committee also does not intend that this provision be read to bar concurrent Federal and State sentences for a defendant who is serving a State sentence at the time he receives a Federal sentence.[318] It should be possible for the Bureau of Prisons to use its authority to contract with State facilities to make equitable arrangements for a defendant to continue to reside in the State facility while serving part of his Federal sentence.

Subsection (b) provides that the defendant will receive credit towards the sentence of imprisonment for any time he has spent in official custody prior to the date the sentence was imposed where the custody was a result of the same offense for which the sentence was imposed or was a result of a separate charge for which he was arrested after the commission of the current offense. No credit would be given if such time had already been credited toward the service of another sentence.

SECTION 3586. IMPLEMENTATION OF A SENTENCE OF IMPRISONMENT

This section calls attention to the imprisonment provisions in subchapter C of chapter 229, and to provisions in subchapter A of chapter 229 relating to terms of supervised release, to facilitate appropriate reference to the portions of the bill that control the general administration of imprisonment and release matters.

CHAPTER 229—POST-SENTENCE ADMINISTRATION

Proposed chapter 229 of title 18, United States Code, consists of three subchapters which cover the administration of the various types of sentences imposed under proposed chapter 227. Subchapter A provides for the appointment of probation officers and sets forth their duties. In addition, it provides for special probation and record expungement procedures for drug possession offenses. Subchapter B covers the payment and collection of fines which may be imposed under subchapter C of chapter 227. Subchapter C of chapter 229, sets forth the procedures for sentences to prison terms.

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[317] This provision is based upon a recommendation of the Judicial Conference of the United States. See Criminal Code Hearings, Part XVI, at 11929.

[318] See notes 310 and 314, *supra*.

SUBCHAPTER A—PROBATION

(Sections 3601-3607)

This subchapter contains the provisions for implementation of a sentence to probation pursuant to proposed subchapter B of chapter 227, the placement of juvenile delinquents on probation pursuant to existing chapter 403, and the placement of an individual on supervised release pursuant to proposed 18 U.S.C. 3583. The subchapter, for the most part, carries forward current law concerning the appointment of probation officers by the courts and the powers and duties of probation officers.

SECTION 3601. SUPERVISION OF PROBATION

Proposed 18 U.S.C. 3601 requires that a person sentenced to a term of probation under proposed subchapter B of chapter 227, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

Current law does not treat probation as a sentence, but rather treats it as a suspension of the execution or imposition of sentence.[319] While it contains no general requirement of probation supervision, by requiring that probation officers report to the courts on the conduct of probationers,[320] it does assume that probationers will be supervised.

While current law permits a juvenile delinquent to be placed on probation,[321] it does not specifically provide that probation officers and the courts have the same duties as to juvenile probationers as they have as to adult probationers.

Under this section, probation officers will also supervise those prisoners who are conditionally released from prison under 18 U.S.C. 3655. While current law refers to these releasees as parolees, rather than as persons released on supervised release, the role of the probation officer in supervising the releasee will remain the same as under current law.

SECTION 3602. APPOINTMENT OF PROBATION OFFICERS

Proposed 18 U.S.C. 3602 is largely derived from 18 U.S.C. 3654. Subsection (a) requires each district court of the United States to appoint suitable and qualified persons to serve with or without compensation as probation officers under the direction of the court. Those appointed with compensation are removable by the court for cause, rather than removable at the discretion of the court. This is a change from existing laws, which was made upon the recommendation of the Probation Committee of the Judicial Conference. Volunteers serving without compensation remain subject to removal at the discretion of the court. The requirement that probation officers be appointed is also new. Under existing law, the court is authorized, rather than required, to appoint probation officers since the original reason for enacting probation legislation was to grant the courts the power to suspend sentences and appoint probation officers, a procedure which the courts had sought to exercise without specific authority.[322]

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[319] 18 U.S.C. 3651. In the case of juvenile delinquents, probation seems to be an alternative to suspension of an adjudication of delinquency or disposition of the delinquent, and to commitment to the Attorney General, rather than the suspension of imposition or execution of sentence. See 18 U.S.C. 5037(b).

[320] 18 U.S.C. 3653 and 3655. In addition, the form used by sentencing judges to list conditions of probation assumes supervision.

[321] 18 U.S.C. 5037(b).

Existing law provides that probation officers be "suitable" but does not include the requirement that they be "qualified" by training or background to be probation officers. Given the bill's encouragement of the use of innovative conditions of probation to meet the purposes of sentencing, different sorts of qualified probation officers should be available to the courts. The effective supervision of a convicted loan-shark, union, forger, or brokerage house, for example, would require quite different qualifications. Some of these qualifications might be found among probation officer "specialists" (who might be made available, as the need arose, to any of several courts); others might be needed so rarely as to warrant only occasional special appointments from the requisite profession to supervise the few cases in which such talents would be helpful.

Existing law also provides that probation officers serve without compensation except when it appears that the "needs of the service" require compensation. This provision has been dropped as outmoded in recognition of the importance of a qualified professional probation system. Of course, the courts may continue to use the services of qualified volunteers.

Proposed 18 U.S.C. 3602(b) carries forward the existing provision concerning the order of appointment of a probation officer.

Subsection (c) carries forward the existing provision permitting designation of a chief probation officer by the court to direct the work of all probation officers serving within the judicial district. The provision has been amended from current law to make clear that each judicial district has only one chief probation officer even if the district has more than one division or place of holding court.

SECTION 3603. DUTIES OF PROBATION OFFICERS

Proposed 18 U.S.C. 3603 carries forward the provisions of 18 U.S.C. 3655 relating to the duties of probation officers with respect to supervision of probationers and the keeping of records and making of reports, but modifies the provisions to include persons released on supervised release following a term of imprisonment pursuant to section 3583. The section also adds a number of specific requirements not found in current law, including the requirements that the probation officer be responsible for supervision of any probationer or person on supervised release known to be within the judicial district (in order to clarify supervised authority over probationers and persons on supervised release transferred into his district or temporarily present in the district), and that, when requested, he supervise and furnish information about persons on work release, furlough, or other authorized release or in pre-release custody pursuant to section 3624(c). The current law provisions requiring probation officers to keep records of money received from probationers have been dropped as unnecessary since it is not the responsibility of the probation officer to perform such functions as collecting fines imposed by the courts.

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[322] See H. Rept. No. 1377, 68th Cong., 2nd Sess. 1 (1925).

SECTION 3604. TRANSPORTATION OF A PROBATIONER

This section carries forward the provisions of 18 U.S.C. 4283 permitting a court to order a United States marshal to furnish transportation to a person placed on probation to the place where he is required to go as a condition of probation. Under existing law, the court also may order subsistence expenses for the probationer while traveling to his destination, not to exceed thirty dollars. Section 3604 does not specify a limitation on the amount of subsistence which could be paid, but would permit the Attorney General to prescribe reasonable subsistence payments.

SECTION 3605. TRANSFER OF JURISDICTION OVER A PROBATIONER

Proposed 18 U.S.C. 3605, relating to transfer of jurisdiction over a probationer or person on supervised release from one court to another, is derived from 18 U.S.C. 3653. Both current law and section 3605 require the concurrence of the court receiving jurisdiction of a probationer in the transfer of jurisdiction. Section 3605 expands current law to cover persons on supervised release and provides that the transfer of a probationer or person on supervised release to another district may be made either as a condition of probation or supervised release or with the permission of the court, while 18 U.S.C. 3653 provides for transfer of a probationer "from the district in which he is being supervised." The ability of the sentencing judge to provide that the defendant move or go to another district as a condition of probation or supervised release [323] could prove to be a very useful aspect of an effective sentence to a term of probation. It could be used in conjunction with a condition to work at particular employment or pursue a particular course of study.[324] Perhaps most important, it could provide the judge with an alternative to a term of imprisonment in the situation where that would otherwise be the only alternative to returning the defendant to an environment in which there would be an unacceptable risk that he might commit another offense.

Section 3605 would also permit a court to which jurisdiction over a probationer or person on supervised release was transferred to exercise all the powers over the probationer or releasee that are permitted by this subchapter or proposed subchapter B of chapter 227. Under 18 U.S.C. 3653, the court to which jurisdiction was transferred could not change the period of probation without consent of the sentencing court. The Committee believes that it is unnecessary to retain the sentencing court's restriction since the new court will be in a better position to know whether a change in the term of probation is justified. In addition, the change should result in simplifying sentencing on new charges, by permitting the transfer of jurisdiction over the probationer or release to the district in which the new charges have been filed so that the sentencing judge may adjust the term of probation or supervised release as needed to serve the purpose of sentencing on the new charge.

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[323] See proposed 18 U.S.C. 3563(b)(14) and 3583(d).

[324] Proposed 18 U.S.C. 3563(b)(5) and 3583(d).

SECTION 3606. ARREST AND RETURN OF A PROBATIONER

Proposed 18 U.S.C. 3606 continues the provisions of 18 U.S.C. 3653 which authorize the arrest and return of a probationer to the court having jurisdiction over him when there has been a violation of a condition of probation, and expands the provision to refer to persons on supervised release pursuant to section 3583. The Committee intends that any probationer arrested for violation of a condition of probation be returned to the district in which he is being supervised even if the arrest is in a different district.

A probation officer may make the arrest, with or without a warrant, wherever the probationer or releasee is found. An arrest warrant for violation of release conditions may be issued by the court having supervision over the individual, or if none, by the court which last had supervision over him. Either a probation officer or a United States Marshal may execute this warrant wherever the probationer or releasee is found. The provisions of 18 U.S.C. 3653 concerning revocation of probation and reimposition of sentence for probation violations are covered in Rule 32.1 of the Federal Rules of Criminal Procedure and in section 3565. As discussed in connection with section 3583, the bill contains no specific provisions concerning revocation of a term of post-release supervision, but instead relies on other remedies, including modification of conditions and the use of the court's contempt powers, to enforce the conditions.

SECTION 2607. SPECIAL PROBATION AND EXPUNGEMENT PROCEDURES FOR DRUG POSSESSORS

Proposed 18 U.S.C. 3607 carries forward the provisions of 21 U.S.C. 844(b) relating to special probation without entry of judgment for first offenders found guilty of violating section 404 of the Controlled Substances Act (21 U.S.C. 844) if there has been no previous conviction of an offense under a Federal or State law relating to controlled substances. The section also permits expungement of records for persons placed on probation under the section if they were under the age of twenty-one at the time of the offense and did not violate a condition of probation.

SUBCHAPTER B—FINES

(Sections 3611-3613)

This subchapter is designed to increase the efficiency with which the government collects fines assessed against criminal defendants.[325] Present law, 18 U.S.C. 3565, provides that criminal fine judgments "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases." Thus, the Federal Government is greatly confined by State law and must litigate in order to collect a fine from an uncooperative defendant. These relatively cumbersome procedures have resulted in collection by the United States in recent years of only 60 to 70 percent of the amount of fines imposed. The consequent awareness by criminal defendants that they may be able to avoid paying fines with relative impunity bodes ill for respect for the law.

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[325] For a comprehensive discussion on collecting and paying fines and penalties, see testimony of William T. Plumb, Jr., Subcommittee Criminal Code Hearings, Part III, at 1709-1732.

This subchapter attempts to remedy this situation by treating criminal fine judgments like tax liens for collection purposes, thereby making available to the Attorney General summary collection procedures similar to those used by the Internal Revenue Service. Foremost among these is the power to administratively levy against the property of the defendant, which precludes disposition of the property to avoid payment and permits realization of the amount of the fine without litigation.

SECTION 3611. PAYMENT OF A FINE

Proposed 18 U.S.C. 3611 provides for the payment of a fine imposed under proposed subchapter C of chapter 227 to the clerk of the sentencing court to be forwarded to the United States Treasury.

The section requires either immediate payment or payment by the time and method specified by the sentencing court. This latter provision is in recognition of the authorization granted the court by proposed 18 U.S.C. 3572(d) to permit payment of a fine within a specified period of time or in specified installments.

SECTION 3612. COLLECTION OF AN UNPAID FINE

Proposed 18 U.S.C. 3612 requires the sentencing court, whenever a fine is imposed, to provide the Attorney General with certain certified information. The Attorney General is then made responsible for the collection of the fine should it not be paid at the time required. This retains the basic current law provision that vests the duty of collecting fines in the Attorney General.

In the case of all fines imposed, subsection (a) requires the district court that imposes sentence to certify to the Attorney General specified information about the defendant and the fine, most of which is identification information and information relating to the case in which the fine is imposed and to the fine itself. The court is also required to certify any subsequent remission or modification of the fine, and to notify the Attorney General of any payments that the court receives with respect to previously certified fines.

This provision, placing responsibility on the clerk of the district court, should improve the notification process and thus better insure that all fine-debtors are brought to the attention of the enforcing authorities in the Department of Justice. At the present time, there is no standardized procedure for notification of the United States attorney. Rather, he receives notification of fines and payment difficulties through a number of methods, which increases the chance of administrative oversight of a failure to pay. By centralizing the responsibility for notification in the district court, section 3612 lessens this chance.

Subsection (b) places the responsibility for collecting and enforcing criminal fines with the Attorney General. Since this responsibility is currently centered in the Criminal Division of the Department of Justice and the United States attorneys, this provision effects no change in existing law. Rather than shifting the burden of enforcement (e.g., to the Internal Revenue Service), the Committee has elected to expand the enforcement powers of the Justice Department in order to strengthen the government's collection effort.

SECTION 3613. LIEN PROVISIONS FOR SATISFACTION OF AN UNPAID FINE

1. In general

Proposed 18 U.S.C. 3613 establishes the procedure by which the Attorney General is to make collection of unpaid fines. This section significantly improves current practices by providing a Federal collection procedure independent of State laws and patterned on the collection procedures utilized so successfully over the years by the Internal Revenue Service.

2. Present Federal law

The primary method of enforcement currently used by the Federal Government is execution of a judgment, either against income (garnishment) or against real or personal property. Writs of execution are issued by the district court and endorsed by the United States marshal. In the case of income executions, the procedures are dictated by the law of the State in which the Federal court sits. Where execution is to be made against property, the procedure to be followed is that detailed in 28 U.S.C. 2001–2007; State law may also be used. In either case, however, State law prescribes how much income may be garnished and the classes of property (e.g., homestead) that are exempt from Federal execution.

Criminal fine judgments are liens on property in the State to the same extent as a judgment of a court of general jurisdiction in the State is a lien. They may also be perfected as liens under State law, if the law of the State in which the district court sits permits perfection of a lien based on a Federal judgment in the same manner as provided for judgments in the State courts.[326] Because of State exemption laws, other perfected liens, and unclear title to the property, enforcement of a Federal lien (which under most State laws is confined to real estate) by foreclosure and sale is usually not a realistic possibility. The Committee regards the lien as a protective first step, since it does help insure the satisfaction of the debt should the defendant-debtor wish to transfer the property.

The laws of several States allow a judgment creditor (in the case of a criminal fine, the United States Government) to obtain an order compelling the judgment debtor (the defendant) to make specified installment payments where it is shown that he is receiving or will receive money from any source. This order is called an installment payment order and results from a Federal district court hearing sought by the United States. Notice must be given to the judgment debtor so that he may appear and contest the motion.

Finally, Rule 69(a) of the Federal Rules of Civil Procedure states in part that:

> In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person, including

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[326] 28 U.S.C. 1962.

> the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

The United States Attorney may use this rule to obtain financial information about the debtor-defendant by oral or written depositions or by written interrogatories. In most cases, the assistance of the district court or a United States magistrate is necessary.

3. Provisions of the bill, as reported

Section 3613(a) eliminates the clerical procedures necessary to create judgment liens, by providing that the fine:

> * * * is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b).

Language added in the 97th Congress requires the Attorney General to release the lien upon acceptance of a bond described in section 6325 of the Internal Revenue Code of 1954, or to issue a certificate of discharge of any part of the person's property subject to a lien if the Attorney General determines that the property remaining is equal in value to at least three times the amount of the fine. These provisions were added in response to business concerns that the original lien provisions could have resulted in tying up property far in excess of that needed to satisfy the lien, making it difficult to carry on normal business transactions pending payment of the fine.

Under subsection (a), a lien similar to a tax lien arises at the time of judgment, and, as subsection (c) provides, may be enforced like a tax lien through the use of administrative levy procedures. Filing under subsection (d) is necessary only to perfect the lien as against innocent third parties.

This procedure significantly alters current practices. As stated previously, 28 U.S.C. 1962 provides that:

> Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed, or otherwise conformed to rules and requirements relating to judgments of the courts of the State.

These liens are usually only against real estate, and enforcement of the lien is often prevented by the State law restrictions noted above. Further, the life of the lien is prescribed by the law of the State in which the district court sits. State laws usually require an abstract of judgment to be filed in the office of the county clerk, county recorder, or other State or county office. A small recording fee is assessed. Most of these procedural limitations and requirements are eliminated by section 3613(a).

Subsection (b) changes current law by imposing a twenty-year statute of limitations on the collection of criminal fines. Under existing law, the government's right to seek execution of a criminal sentence, including a fine, is not subject to time limitations.[327] Currently, such cases may be closed only through payment in full, death of the debtor, or Presidential pardon. The limitation period established by subsection (b) will permit the closing of files by United States Attorneys for cases which are so old that collection of fines is unlikely. With the new enforcement tools of section 3613, it seems reasonable to conclude that if a debtor is pursued unsuccessfully for the twenty-year period, it is unlikely that additional enforcement efforts would prove fruitful. A number of unproductive clerical tasks will thus be eliminated by this provision.

The period for collection may be extended by a written agreement entered into by the defendant and the Attorney General prior to the expiration of the period. This allowance for an extension is similar to that existing in the tax area.[328]

Subsection (b) also provides that the running of the twenty-year statute of limitations is to be suspended "during any interval for which the running of the period of limitations for collection of a tax would be suspended" pursuant to the following provisions of law:

> (A) 26 U.S.C. 6503(b), relating to cases where the assets of the taxpayer are in the control of custody of a court in a proceeding before any United States, District of Columbia, or State court; the suspension of the limitations period is also extended for six months after the court proceeding ends;
>
> (B) 26 U.S.C. 6503(c), relating to cases where the taxpayer is outside the United States if the absence is for a continuous period of at least six months;
>
> (C) 26 U.S.C. 6503(f), relating to cases where the property of a third person has been wrongfully seized;
>
> (D) 26 U.S.C. 7508(a)(1)(I), relating to cases where the person is serving in the armed forces of the United States, or in support of such forces, during time of war, or is in a hospital as a result of a combat injury, and for 180 days thereafter; and
>
> (E) section 513 of the Act of October 17, 1940, 54 Stat. 1190, relating to cases where the person is serving in the military.

Finally, subsection (b) provides that a lien becomes unenforceable and liability to pay a fine expires upon the death of the individual fined. This is in keeping with present law, and reflects one of the differences between a criminal fine and a tax liability, despite their generally similar treatment in this statute. The word "individual" is used instead of "person" to exclude organizations such as corporations from this provision, and to avoid the argument that a fine against a corporation is extinguished on the dissolution (and therefore "death") of the corporation. In such case, an existing fine will make the United States a creditor against the assets of the dissolved corporation with whatever preferences the provisions of this section grant.

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[327] *Smith* v. *United States*, 143 F.2d 228 (9th Cir.), cert. denied, 323 U.S. 729 (1944).

[328] See 26 U.S.C. 6501(c)(4).

Subsection (c) provides that certain sections of the Internal Revenue Code of 1954, as amended, shall:

> * * * apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities.

Among the provisions of title 26 incorporated by reference into section 3613, the most significant, of course, is the administrative levy power referred to previously. The following is a summary of the provisions of the tax code cross-referenced in section 3613 and made applicable to the collection of a fine:

(i) 26 U.S.C. 6323 (other than 6323(f)(4)), which contains notice and filing provisions, compliance with which is necessary to insure the validity of a tax lien against certain third persons; priority rules are also set forth;

(ii) 26 U.S.C. 6331, which authorizes the Secretary to collect a tax by levy on the property of a delinquent taxpayer if the lien has not been satisfied; as has been stated, incorporating this power into the scheme for collection of fines is the most significant change wrought by section 3613; it should be noted that 26 U.S.C. 6502, which establishes a six-year limitation period on the use of an administrative levy, has not been included in the section 3613 cross-references from title 26; thus, the twenty-year period set forth in section 3613(b) will also apply to the levy power in the area of criminal fine collection;

(iii) 26 U.S.C. 6332, which requires surrender of property subject to levy, and also provides for enforcement of the levy by civil penalty;

(iv) 26 U.S.C. 6333, which provides for demand by the Secretary of books and records relating to the property subject to levy;

(v) 26 U.S.C. 6334, which provides that certain property (including various unemployment benefits, retirement benefits, workman's compensation, and tools of a trade up to a value of $250) is exempt from levy; these exemptions are limited and standard; comparison should be made to the greater and more varied number of exceptions provided for in State laws to which the Federal government is now subject;

(vi) 26 U.S.C. 6335, which sets forth the procedure to be used in the sale of property seized pursuant to levy;

(vii) 26 U.S.C. 6336, which covers the sale of perishable goods;

(viii) 26 U.S.C. 6337, which provides for redemption of property before sale, and, with respect to real property, redemption after sale;

(ix) 26 U.S.C. 6338, which provides that a certificate of sale is to be given to the purchaser of the property sold, and that a deed shall also be given where the property sold is real estate;

(x) 26 U.S.C. 6339, which provides that the certificate of sale and the deed are to have certain legal effects, including their use as conclusive evidence as to the regularity of the proceedings, the transfer of the right, title, and interest of the party delinquent, etc.;

(xi) 26 U.S.C. 6340, which requires records to be kept of all sales;

(xii) 26 U.S.C. 6341, which requires the Secretary to determine which expenses are to be allowed in all cases of levy and sale;

(xiii) 26 U.S.C. 6342, which sets forth the order in which the proceeds of the levy and sale are to be applied to the taxpayer's liability;

(xiv) 26 U.S.C. 6343, which authorizes the Secretary to release the levy and to return the property, or proceeds, where the property has been wrongfully levied;

(xv) 26 U.S.C. 6901, which relates to the liability of a transferee in certain instances for a tax of the transferor in order to prevent a successful transfer to avoid liability;

(xvi) 26 U.S.C. 7402, which grants jurisdiction to the Federal courts in tax collection matters;

(xvii) 26 U.S.C. 7403, which allows the filing of an action to enforce a lien, or to subject property to the payment of a tax, whether or not a levy has been made; the court may appoint a receiver to enforce the lien;

(xviii) 26 U.S.C. 7405, which allows a civil suit to be brought to recover erroneous refunds;

(xix) 26 U.S.C. 7423, which authorizes the Secretary to allow repayment to an officer or employee of the United States of the full amount of sums that may be recovered against him in any court, for any taxes collected by him or any damages recovered against him in connection with anything done by him in the performance of his official duty;

(xx) 26 U.S.C. 7424, which permits intervention by the United States in any civil action to assert any lien on property which is the subject of the suit;

(xxi) 26 U.S.C. 7425, which provides for the discharge of a lien where the United States is not a party to the suit, unless notice of the lien was filed in the place provided for by law, according to the law of the place where the property was situated; where a judicial sale discharges a lien, the United States may claim the proceeds (before their distribution is ordered) with the same priority that the lien had; the United States may also redeem real property sold to satisfy a lien, under certain conditions;

(xxii) 26 U.S.C. 7426, which provides for suits against the United States by persons claiming an interest in the property levied, where the levy is claimed to be wrongful, or where the person claims an interest in surplus proceeds; an exception is provided for the person against whom the tax was assessed, out of which the levy arose;

(xxiii) 26 U.S.C. 7505(a), which provides that any personal property acquired by the United States in payment of, or as security for, debts arising out of the internal revenue laws may be sold by the Secretary in accordance with prescribed regulations;

(xxiv) 26 U.S.C. 7506, which provides that the Secretary shall have charge of all real estate acquired by the United States pursuant to the internal revenue laws, and may sell or lease the property, or, if the debt has been paid, release it to the debtor;

(xxv) 26 U.S.C. 7508, which provides that certain acts relating to the operation of the internal revenue laws shall be postponed because of service in a combat zone;

(xxvi) 26 U.S.C. 7602, which authorizes the Secretary to examine books and records, summon the person having the custody of books and records to appear with them, and take testimony under oath for the purpose of determining liability under the internal revenue laws;

(xxvii) 26 U.S.C. 7603, which provides for service of an administrative summons;

(xxviii) 26 U.S.C. 7604, which provides for enforcement of the summons;

(xxix) 26 U.S.C. 7605, which covers the time and place of the examination authorized in section 7602 and provides for certain restrictions on the examination;

(xxx) 26 U.S.C. 7622, which authorizes employees of the Treasury Department, designated by the Secretary, to administer oaths and affirmations and certify papers;

(xxxi) 26 U.S.C. 7701, which defines terms used throughout the rest of the title;

(xxxii) 26 U.S.C. 7805, which gives the Secretary authority to issue regulations governing enforcement of title 26, unless such authority is expressly granted to another person; and

(xxxiii) section 513 of the Act of October 17, 1940, 54 Stat. 1190, which provides for the suspension of the statute of limitations, and the collection of taxes, for persons in military service.

The Committee intends that the specialized terminology relating to tax collection in the cross-referenced provisions of the Internal Revenue Code be read, for purposes of this subchapter, as relating to the collection of a criminal fine. Thus, the term "Secretary of the Treasury" would be read as "Attorney General" and the term "tax" would be read as "fine." To carry out this intention, section 3613(c) authorizes the substitution of those terms and, in addition, authorizes the Attorney General to issue regulations for administration of fine collection which utilize appropriate terminology.

Section 3613(d) provides that a notice of a lien imposed under subsection (a) is to be considered a notice of a lien for taxes payable to the United States for the purpose of any State or local law providing for the filing of a notice of a tax lien. Because the lien created by a criminal fine is to be treated as it if were a tax lien, the filing provisions of 26 U.S.C. 6323 will apply to fines. If the Attorney General declares that State or local officials have determined that such filing is unacceptable, then 28 U.S.C. 1962, which provides for the registration, recording, docketing, or indexing of Federal court judgments, will apply instead.

SUBCHAPTER C—IMPRISONMENT

(Sections 3621–3625)

Proposed subchapter C of chapter 229 of title 18 contains the provisions for implementation of a sentence of imprisonment imposed under subchapter D of chapter 227. The subchapter generally follows existing law, except that custody of Federal prisoners is placed in the Bureau of Prisons directly rather than in the Attorney General, thus giving the Bureau of Prisons direct authority to determine matters, such as the place of confinement of a prisoner, which are presently determined by the Attorney General. Provisions relative to the organization and responsibilities of the Bureau of Prisons are continued in chapters 301 and 303 of title 18.

SECTION 3621. IMPRISONMENT OF A CONVICTED PERSON

This section is derived from existing law.

Proposed 18 U.S.C. 3621(a) is derived from 18 U.S.C. 4082(a) except that the new provision places custody of Federal prisoners directly in the Bureau of Prisons rather than in the Attorney General. This change is not intended to affect the authority of the Bureau of Prisons with regard to such matters as place of confinement of prisoners, transfers of prisoners, and correctional programs, but is designed only to simplify the administration of the prison system. Direct custody of prisoners will be in the Bureau of Prisons, but the Director of the Bureau of Prisons will remain subject to appointment by the Attorney General [329] and subject to his direction.[330] In addition, it is made clear that the custody of the Bureau of Prisons continues until the expiration of the term of imprisonment, or until release at the expiration of that term less any time credited toward service of sentence pursuant to section 3624(b).

Proposed 18 U.S.C. 3621(b) follows existing law [331] in providing that the authority to designate the place of confinement for Federal prisoners rests in the Bureau of Prisons.[332] The designated penal or correctional facility need not be in the judicial district in which the prisoner was convicted and need not be maintained by the Federal Government. Existing law provides that the Bureau may designate a place of confinement that is available, appropriate, and suitable. Section 3621(b) continues that discretionary authority with a new requirement that the facility meet minimum standards of health and habitability established by the Bureau of Prisons. In determining the availability or suitability of the facility selected, the Bureau is specifically required to consider such factors as the resources of the facility considered, the nature and circumstances of the offense, the history and characteristics of the prisoner, the statements made by the sentencing court concerning the purposes for imprisonment in a particular case,[333] any recommendations as to type of facility made by the court, and any pertinent policy statements issued by the Sentencing Commission pursuant to proposed 28 U.S.C. 994(a)(2). After considering these factors, the Bureau of Prisons may designate the place of imprisonment in an appropriate type of facility, or may transfer the offender to another appropriate facility.

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[329] 18 U.S.C. 4041.

[330] *Ibid.*

[331] 18 U.S.C. 4082(b).

[332] *United States* v. *McIntyre*, 271 F. Supp. 991, 999 (S.D.N.Y. 1967), aff'd, 396 F.2d 859 (2d Cir. 1968), cert. denied, 393 U.S. 1054 (1969).

In the absence of unusual circumstances, Federal courts currently will not review a decision as to the place of confinement.[334] The Committee, by listing factors for the Bureau to consider in determining the appropriateness or suitability of any available facility, does not intend to restrict or limit the Bureau in the exercise of its existing discretion so long as the facility meets the minimum standards of health and habitability of the Bureau, but intends simply to set forth the appropriate factors that the Bureau should consider in making the designations.

Proposed 18 U.S.C. 3621(c), dealing with delivery of the order of commitment to the person in charge of a penal or correctional facility, is drawn from existing 18 U.S.C. 4084 with little change.

Proposed 18 U.S.C. 3621(d), which is derived from 18 U.S.C. 3012, provides that the United States marshal shall, without charge, deliver a prisoner into court or return him to a prison facility on order of a court of the United States or on request of an attorney for the government.

SECTION 3622. TEMPORARY RELEASE OF A PRISONER

Proposed 18 U.S.C. 3622 is derived from 18 U.S.C. 4028(c), and permits temporary release of a prisoner by the Bureau of Prisons for specified reasons. The only criterion for such release in current law is that there be "reasonable cause to believe * * * [the prisoner] will honor his trust." Under section 3622, the release would also have to appear to be consistent with the purpose for which the sentence was imposed and with any pertinent policy statements of the Sentencing Commission, and the release would have to appear to be consistent with the public interest. These requirements emphasize factors important to the overall correctional program for the defendant, rather than the sole factor of the probability of the prisoner's return to the facility at the appropriate time.

Section 3622(a) carries forward from current law the list of purposes for which a prisoner may be released for a period not to exceed thirty days, including visits to a dying relative, to attend the funeral of a relative, to obtain medical treatment not otherwise available, to contact a prospective employer, and to preserve or reestablish family or community ties. Authority for a limited release is also to be found in the catch-all clause at the end of the subsection, carried forward from current law, permitting release for any other significant purpose consistent with the public interest.

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[333] Proposed 18 U.S.C. 3553(b) requires a statement of reasons for imposing a sentence.

[334] See *Darcey* v. *United States*, 318 F. Supp. 1340 (W.D. Mo. 1970).

Proposed 18 U.S.C. 3622 (b) and (c) carry forward the provisions of 18 U.S.C. 4082(c)(2) permitting temporary release of an offender, while continuing in official detention at the penal or correctional facility, for work at paid employment or participation in a training program in the community on a voluntary basis. Section 3622(b) adds a new provision permitting temporary release to participate in an educational program, to make it clear that release may be for such purposes as pursuing a course of study in college as well as for vocational training. Subsection (c), relating to employment, modifies current law (18 U.S.C. 4082(c)(2)) by dropping the requirement that local unions be consulted and a provision barring work release where other workers might be displaced. While the Bureau of Prisons needs to be sensitive to the impact of its programs on the community, the Committee believes that it should have more flexibility than provided in current law in developing work programs in appropriate cases. The Committee believes that the long-range gain to the prisoner and to the community from a well-conceived work program will not adversely affect the community interests in adequate employment opportunities.

The Committee does not intend that work release under this subsection be expanded to the extent that it develops into a device for early release from prison. A sentence to imprisonment means confinement in an appropriate correctional facility with a program designed to meet the needs of the particular prisoner, considering the purposes of his sentence and his particular needs.

Subsection (c)(1) carries forward the provisions of current law that require that work in the community must be at the same rates and under the same conditions as for similar employment in the community involved. Subsection (c)(2) requires that the prisoner agree to pay costs incident to his detention as a condition of work release. Under current law, 18 U.S.C. 4082(c), the prisoner may be required to make such payments.

As with subsection (a), temporary release under subsections (b) and (c) is within the discretion of the Bureau of Prisons; there is no absolute right to work release or other outside privileges.[335] Failure to remain within the confines permitted by the release, and failure to return to the corrections facility as required, would, as under current law, be treated as an escape.[336]

SECTION 3623. TRANSFER OF A PRISONER TO STATE AUTHORITY

Proposed 18 U.S.C. 3623 delineates the circumstances under which the Director of the Bureau of Prisons must order the transfer of a Federal prisoner to a State facility prior to his release from the Federal facility. The section is derived from 18 U.S.C. 4085(a), except that language relating to appropriations is omitted as unnecessary.

Like 18 U.S.C. 4085, section 3623 provides that the Director of the Bureau of Prisons must order that a prisoner be transferred to an official detention facility within a State prior to the prisoner's release from the Federal prison if certain requirements are satisfied. First, the prisoner must have been charged in an indictment or information with a felony or have been convicted of a felony in that State. Second, the transfer must have been requested by the governor or other executive authority of the State. Next, the State must send to the Director, usually along with the request, a certified copy of the indictment, information, or judgment of conviction. Finally, the Director must find that the transfer would be in the public interest.

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[335] See *Green* v. *United States*, 481 F.2d 1140 (D.C. Cir. 1973).

[336] 18 U.S.C. 4082(d).

The last requirement of public interest places the entire transfer procedure directly within the discretion of the Director of the Bureau of Prisons. This granting of discretion to the Director follows closely section 3621(b) which permits the Bureau to designate the place of the prisoner's confinement, whether or not such place is maintained by the Federal Government. Under both statutes, the exercise of discretion by the Bureau will not be disturbed other than in exceptional circumstances.[337] It should be noted that at no time is it necessary for the prisoner to consent to the transfer to State authorities. Moreover, generally, a prisoner can have no valid objection to a transfer.[338]

In addition, the Committee clearly intends that the Federal Government will not lose jurisdiction of any prisoner whose Federal sentence has not expired simply because it permits a State to take the prisoner into custody under this section.[339] In most circumstances, however, the Federal Government may have to await the completion of State proceedings before regaining custody of the prisoner.

This section provides, and common sense dictates, that if more than one request from a State is presented with respect to a certain prisoner, the Director must determine which request, if any is to be honored, should be given priority. This procedure, too, is within the discretion of the Director.

Finally, the section provides that the costs of transferring a prisoner to a State authority will be borne by the State requesting the transfer.

SECTION 3624. RELEASE OF A PRISONER

Proposed 18 U.S.C. 3624(a) describes the method by which the release date of a prisoner is determined.

Section 3624(a) replaces a confusing array of statutes and administrative procedures concerning the determination of the date of release of a prisoner. Perhaps the most confusing aspect of the current law provisions is the fact that, for a regular adult prisoner whose term of imprisonment exceeds one year, there are two mechanisms for determining the release date, each of which requires recordkeeping and constant evaluation of prisoner eligibility for release. The prisoner is ultimately released on the earlier of the two release dates that result from the parallel determinations.

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[337] See *Little* v. *Swanson*, 282 F. Supp. 333 (W.D. Mo. 1968).

[338] Cf. *Konigsburg* v. *Ciccone*, 285 F. Supp. 585 (W.D. Mo. 1968), aff'd, 417 F.2d 161 (8th Cir. 1969), cert. denied, 397 U.S. 963 (1970).

[339] See *Potter* v. *Ciccone*, 316 F. Supp. 703 (W.D. Mo. 1970).

First, 18 U.S.C. 4163 requires that a prisoner who has not been released earlier, for example on parole, must be released at the expiration of his sentence less credit for good conduct.[340]

Under 18 U.S.C. 4164, if a prisoner released at the expiration of his sentence less good time has accumulated 180 days or more of good time credit, he is released as if on parole [341] and supervised for the remaining period of his sentence less 180 days.

For a prisoner whose term of imprisonment exceeds one year in length, at the same time that the Bureau of Prisons is keeping records on good time allowances, the United States Parole Commission is periodically evaluating whether the prisoner should be released on parole.

A prisoner sentenced to a term of imprisonment of not less than six months nor more than one year is released at the expiration of sentence less credit for good time, except that the judge may specify that the prisoner will be released as if on parole after serving one-third of his sentence.[342]

If the sentence of a regular adult offender is less than six months long, he is ineligible for either parole [343] or receipt of good time allowance [344] (other than industrial or meritorious good time),[345] and his release date is set by operation of law at the expiration of his term of imprisonment less any accumulated industrial or meritorious good time.[346]

There are also specialized sentencing statutes for certain young offenders for release dates to be set by the Parole Commission for all offenders who come within their terms, thus making the provisions of 18 U.S.C. 4163, relating to the release of the prisoner at the expiration of sentence less good time, inapplicable.[347]

A "youth offender" [348] given an indeterminate sentence under the Federal Youth Corrections Act [349] is immediately eligible for parole,[350] and must be released on parole before the expiration of four years from the date of conviction.[351] If the youth offender is sentenced under the Federal Youth Corrections Act to a sentence up to that permitted for the offense for a person sentenced as an adult,[352] he is likewise immediately eligible for parole,[353] and must be released at least two years before the expiration of his term of imprisonment.[354]

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[340] See 18 U.S.C. 4161 and 4162. Similar mechanisms for setting release dates would result for drug addicts sentenced pursuant to title II of the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4251, even though the Act provides specialized sentencing for those prisoners. While the sentence is indeterminate (with a maximum of 10 years so long as it does not exceed the sentence otherwise available for the offense), with eligibility for conditional release as if on parole after six months, it is still possible that the prisoner will serve the full term of imprisonment less good time and be released pursuant to the provisions of 18 U.S.C. 4163.

[341] In other words, the prisoner will be subject to parole supervision upon release but his release date will not be determined by the Parole Commission.

[342] 18 U.S.C. 4205(f).

[343] 18 U.S.C. 4205 (a) and (b).

[344] See 18 U.S.C. 4161.

[345] 18 U.S.C. 4162.

[346] 18 U.S.C. 4163.

[347] However, the good time statutes may still play a role in the determination of when to release these prisoners on parole since the Parole Commission considers forfeiture of good time in determining whether a prisoner has substantially complied with the rules of the institution. However, the specialized sentencing statutes do not permit a defendant sentenced under them to be released except on parole. If the prisoner is ineligible for parole on the date on which he would ordinarily be released on parole because of forfeited good time that has not been restored, his parole release date is merely extended to any period up to the time that the law requires release on parole.

[348] 18 U.S.C. 5006(d) defines a "youth offender" as a person who is under 22 years of age at the time of conviction.

[349] 18 U.S.C. 5010(b).

[350] 18 U.S.C. 5017(a).

[351] 18 U.S.C. 5017(c).

Similar requirements for release on parole apply to young adult offenders (between 22 and 26 years old at the time of conviction) whom the judge decides to sentence pursuant to the Federal Youth Corrections Act.[355]

Proposed 18 U.S.C. 3624(a) replaces the multiplicity of release date statutes with a single provision that describes the mechanism for setting the release date. Unlike current law, two mechanisms will never be used simultaneously, thus eliminating the unnecessary confusion caused by existing requirements.

Section 3624(a) provides that a prisoner is to be released at the expiration of his term of imprisonment less any credit toward the service of his sentence for satisfactory prison behavior accumulated pursuant to subsection (b). Thus, as discussed in the introduction to this report and in connection with subchapter D of chapter 227, every sentence to a term of imprisonment will represent the actual time to be served, less good time. There will be no artificially high sentences imposed to allow for the operation of the parole system, which has no role as to prisoners sentenced under the bill.

Section 3624(a) also contains a provision which permits the Bureau of Prisons to release the prisoner on the last preceding weekday if the date of the expiration of his term of imprisonment falls on a weekend or a legal holiday. This early release is discretionary with the Bureau; nevertheless, the Bureau may not keep the prisoner incarcerated longer than his term. Therefore, if the prisoner is not released on the weekday before the weekend or legal holiday, he must be released on the Saturday, Sunday, or holiday. This subsection carries forward existing law.[356]

Proposed 18 U.S.C. 3624(b) contains the provisions concerning the earning of credit toward early release for satisfactory prison behavior. It applies only to persons who are sentenced to terms of imprisonment longer than one year, except those sentenced to life imprisonment. The duplication of effort in current law, requiring computation of good time allowances for every prisoner whose term of imprisonment is six months long or longer[357] even if the prisoner will ultimately have his release date set by the Parole Commission,[358] of course does not occur under the Committee's determinate sentencing system.

Computation of credit toward early release pursuant to section 3624(b) will be considerably less complicated than under current law in many respects. Current law provides a different rate of credit for good behavior for different lengths of prison terms,[359] while section 3624(b) provides a uniform maximum rate of 36 days a year for all time in prison beyond the first year. In addition, current law permits forfeiture or withholding of any amount of good time that has been earned up to the time of the forfeiture or withholding, and the restoration of any amount of the forfeited or withheld good time.[360] Section 3624(b) provides for automatic vesting of credit toward early release at the end of each year of satisfactory behavior, with the result that only a single year's worth of credit toward early release can be affected by a violation of the prison rules.[361] Credit for the last year would be prorated.

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[352] 18 U.S.C. 5010(c).

[353] 18 U.S.C. 5017(a).

[354] 18 U.S.C. 5017(d).

[355] See 18 U.S.C. 4216.

[356] 18 U.S.C. 4163.

[357] 18 U.S.C. 4161.

[358] The Parole Commission considers whether to release on parole any prisoner whose sentence exceeds one year in length. 18 U.S.C. 4205(a).

[359] Under 18 U.S.C. 4161, good time allowances are credited at rates of from five to ten days a month, with three rates in between, depending upon the length of the term of imprisonment.

The result of the complexity of current law provisions concerning good time allowances is to increase the uncertainty of the prisoner as to his release date, with a resulting adverse effect on prisoner morale.

Current law also probably fails to have the intended effect on maintaining prison discipline.[362] Prisoners tend to expect that good time will be restored, and it usually is. Thus, only the prisoner who has forfeited good time that has not been restored, and who is thus ineligible for parole, is actually affected by the provisions for forfeiture.

It is the belief of the Committee that the simplified provisions of section 3624(b) will have a positive effect on prisoner behavior. The credit toward early release is earned at a steady and easily determined rate that will have an obvious impact on the prisoner's release date. The rate is sufficiently high (approximately 10 percent of the part of a term of imprisonment that exceeds one year) to provide an incentive for good institutional behavior, yet not so high that it will carry forward the uncertainties as to release dates that occur under current law.

The new provisions will also be easier (and probably cheaper) to administer than those under current law. The credit toward early release will vest automatically unless the Bureau of Prisons determines that a violation of prison rules should result in withholding of some or all of the credit toward early release for a particular period. In addition, the Bureau of Prisons will have to determine the release dates for credit toward early release only for those prisoners whose time in prison will actually depend upon the credit they have earned, rather than also making this determination for prisoners whose release dates will be set by the Parole Commission.

Is should be noted that subsection (b) permits the withholding of credit toward early release only for violation of institutional disciplinary regulations that have been approved by the Attorney General and given to the prisoner. Thus, the prisoner will be put on notice as to the actions that may result in his failure to earn credit toward early release.

Proposed 18 U.S.C. 3624(c) is new. It provides that, to the extent practicable, the last ten percent of a term of imprisonment, not in excess of six months, should be spent in circumstances that afford the prisoner a reasonable opportunity to adjust to and prepare for reentry into the community.

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[360] 18 U.S.C. 4165.

[361] Of course, if a violation of rules is a criminal offense, the offense can be prosecuted in appropriate cases.

[362] See Subcommittee Criminal Code Hearings, Part XIII, at 8882 and 8894.

It is intended that the Bureau of Prisons have substantial discretion in determining what opportunity for reentry should be made available to each particular prisoner under the circumstances of his case. The Probation System is required, to the extent practicable, to offer assistance to prisoners at this pre-release stage. This will permit probation officers to assist prisoners in seeking employment and medical or social services as needed.

Proposed 18 U.S.C. 3624(d), relating to the allotment of clothing, transportation, and funds to a prisoner released at the expiration of his term of imprisonment, is derived from 18 U.S.C. 4281 and 4284, with several changes. The amount of money to be furnished a prisoner has been raised to a maximum of $500 rather than $100, and the provision of 18 U.S.C. 4284 for loans to prisoners has been omitted. The Committee has concluded that a small amount of financial assistance may be sufficient to get an offender started in the right direction, but that the $100 maximum sum permitted under existing law may often be inadequate. The loan provisions in existing law have no proved successful, having caused greater administrative costs and difficulties than the amount of money involved justifies. Accordingly, the total amount of money which can be given a prisoner has been raised to $500 with no provision for a small loan. The determination of the amount to be given each prisoner under section 3624(d) is to be made by the Director of the Bureau of Prisons, rather than the Attorney General, in keeping with other amendments placing day-to-day control of the operations of the Bureau of Prisons in the Director. A new provision has been added to specify that the Director shall make the determination of the amount to be given to a particular prisoner according to the public interest and the needs of the prisoner. The language has also been clarified to require the Director to provide a prisoner with some money unless he determines that the prisoner's financial situation is such that no money should be provided.

Finally, as under current law, the prisoner must be furnished transportation to one of three places: (1) the place of conviction; (2) his bona fide residence within the United States; or (3) any other place authorized by the Director of the Bureau of Prisons.

The Bureau of Prisons could, of course, provide transportation expenses rather than actually providing transportation, but the funds for transportation are to be in addition to the amount of money provided the prisoner under section 3624(d)(2) to assist him upon his release. This provision is essentially the same as that contained in 18 U.S.C. 4281, except that under that provision the determination of the place to which a prisoner would be transported was made by the Attorney General. In making this determination the Director will necessarily have to take cognizance of the terms and conditions of supervised release if such a term is imposed pursuant to section 3583.

Subsection (e) provides that a prisoner whose sentence includes a term of supervised release shall be released to the supervision of a probation officer. It also specifies that the term begins on the date of release and that it runs concurrently with any other term of supervised release, probation, or parole unless the person is imprisoned other than for a brief period as a condition of probation or supervised release.

SECTION 3625. INAPPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT

This section makes clear that certain of the provisions of the Administrative Procedure Act do not apply to any determination, decision, or order of the Bureau of Prisons.[363] This result is in accord with recent case law,[364] and will assure that the Bureau of Prisons is able to make decisions concerning the appropriate facility, corrections program, and disciplinary measures for a particular prisoner without constant second-guessing. The provision, of course, would not eliminate, and is not intended to eliminate, constitutional challenges by prisoners under the appropriate provisions of law. Constitutional requirements in personal disciplinary actions have been established by the Supreme Court.[365] The Committee feels that there is no need to add additional due process procedures to those specified by the courts. The sections of the APA made inapplicable to the Bureau of Prisons are parallel to those currently made inapplicable to the Parole Commission.

The phrase "determination, decision, or order" is intended to mean adjudication of specific cases as opposed to promulgation of generally applicable regulations.

Section 202(a)(4) of the bill creates a new section 3673 of title 18 that defines terms used in proposed chapters 227 and 229 of title 18, United States Code.

Section 202(a)(5) of the bill adds a caption and sectional analysis for chapter 232 of title 18, United States Code, the chapter created from the sections of title 18, redesignated by section 202(a)(1) of the bill.

Section 202(b) contains technical amendments to the chapter analysis of part II of title 18, United States Code, necessitated by the bill.

Section 203(a) of the bill adds to chapter 235 of title 18, United States Code, a new section 3742, relating to appellate review of sentences.

SECTION 3742. REVIEW OF A SENTENCE

1. In general

This section establishes a limited practice of appellate review of sentences in the Federal criminal justice system. The Committee is especially indebted to the work of former Senator Roman L. Hruska for the contents of this section. He has led a long and steadfast effort to introduce appellate review of sentencing—an effort stretching back over several Congresses.[366]

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[363] 5 U.S.C. 554 and 555 and 701 through 706. The APA continues to apply to regulation-making authority of the Bureau of Prisons. See *Ramer* v. *Saxbe*, 522 F.2d 695 (D.C. Cir. 1975).

[364] See *Clardy* v. *Levi*, 545 F.2d 1241 (9th Cir. 1976) (APA not applicable to prison discipline proceedings); *Wolfish* v. *Levi*, 573 F.2d 118, 125 (2d Cir. 1978) (determinations of Bureau of Prisons are discretionary agency action so no need to reach question whether APA applies to them), reversed on other grounds *sub nom. Bell* v. *Wolfish*, 441 U.S. 520 (1979).

[365] See *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

[366] See Subcommittee Criminal Code Hearings, Part III, at 1568–74.

Appellate courts have long followed the principle that sentences imposed by district courts within legal limits should not be disturbed.[367] The sentencing provisions of the reported bill are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, they are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing. Section 3742 accommodates all of these considerations by making appellate review of sentences available equally to the defendant and the government, and by confining it to cases in which the sentences are illegal, are imposed as the result of an incorrect application of the sentencing guidelines, or are outside the range specified in the guidelines and unreasonable.

It is an anomaly to provide for appellate correction of prejudicial trial errors and not to provide for appellate correction of incorrect or unreasonable sentences.[368] The reason given for unavailability of appellate review of sentences under current law is the fact that sentencing judges have traditionally had almost absolute discretion to impose any sentence legally available in a particular case. In doing so, the judges have not been required to state reasons for their decisions,[369] and rarely have done so. Thus, even if appellate review of sentences were available under current law, the courts of appeals would have difficulty assessing the reasonableness of a sentencing decision since they would be unable to tell in many cases why the sentences in two apparently similar cases were different.

The systematized sentencing system introduced by this bill, including the use of sentencing guidelines promulgated by a newly created Sentencing Commission, as provided in proposed chapter 58 of title 28, United States Code, should do much to eliminate unwarranted disparities in Federal sentences. Yet each offender stands before a court as an individual, different in some ways from other offenders. The offense, too, may have been committed under highly individual circumstances. Even the fullest consideration and the most subtle appreciation of the pertinent factors—the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case—cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable but desirable.

It is expected that most sentences will fall within the ranges recommended in the sentencing guidelines. Only if a judge believes that there is an offense or offender characteristic, not adequately considered by the Sentencing Commission, that justifies a sentence different from that provided in the applicable guideline should the judge deviate from the guideline's recommendation. If the sentence differs from the guidelines sentence, the judge is required to state specific reasons for the sentence outside the guideline. Because sentencing judges retain the flexibility of sentencing outside the guidelines, it is inevitable that some of the sentences outside the guidelines will appear to be too severe or too lenient.

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[367] An exception is contempt. See *Green* v. *United States*, 356 U.S. 165 (1958); *United States* v. *Bukowski*, 435 F.2d 1094 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971). Two additional exceptions are 18 U.S.C. 3576 and 21 U.S.C. 849(h).

[368] See Subcommittee Criminal Code Hearings, Part VI, at 5649-53 (statement of the Hon. Marvin E. Frankel). Illegal sentences are subject to correction today pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

[369] See *United States* v. *Dorszynski*, 418 U.S. 424 (1974) (relating to Youth Corrections Act).

Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the Sentencing Commission in refining the sentencing guidelines as the need arises. For example, if the courts found that a particular offense or offender characteristic that was not considered, or not adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to consider amending the guidelines to reflect the factor.

Although some persons have challenged the wisdom and validity of permitting an appeal of a sentence by the government, the Committee is convinced that neither objection has merit.

It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government, on behalf of the public, to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient.[370] This consideration has led most Western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the Committee considers it to be a critical part of the foundation for the bill's sentencing structure. The unequal availability of appellate review, moreover, would have a tendency to skew the system, since if appellate review were a one-way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater consistency might well result in a gradual scaling down of sentences to the level of the most lenient ones. Certainly the development of a principled and balanced body of appellate case law would be severely hampered.

With respect to validity, it is clear that a system, such as is provided by the reported bill, in which sentence increase is possible as a consequence of sentence review initiated by the government, is not objectionable on constitutional grounds. Title X of the Organized Crime Control Act of 1970 includes a provision (18 U.S.C. 3576) permitting a sentence imposed under the dangerous special offender provision to be increased upon appeal by the United States.[371] The Supreme Court in *United States* v. *DiFrancesco*[372]

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[370] This would be the case even if the appellate court were authorized to augment (as well as diminish) the sentence, since it is unlikely that a defendant would choose to appeal, on the basis of alleged excessiveness, a sentence deemed by the reviewing court as so inadequate as to warrant enhancement. Such a system, moreover, places an undesirable strain on the defendant's right to seek sentence review. For these reasons, *inter alia*, such a scheme was rejected by the Committee.

[371] 21 U.S.C. 849 contains a similar provision as to dangerous special drug offenders.

[372] 449 U.S. 117 (1980). The Committee does not view the decision in *Bullington* v. *Missouri*, 451 U.S. 430 (1981), as undermining the validity of the sentence review procedures set forth in

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held that the authority contained in that statute for government appeal of sentence did not violate the double jeopardy clause. According to the Court:

> The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence. We have noted * * * the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under § 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. To be sure, the appeal may prolong the period of any anxiety that may exist, but it does so only for the finite period provided by the statute. The appeal is no more of an ordeal than any Government appeal under 18 U.S.C. § 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature.[373]

The Court also held that there was no double jeopardy problem with the fact that the defendant's sentence could be increased on successful government appeal of the sentence, making clear that the bar against double punishments applied to a total punishment in excess of the statutory maximum for the offense, not to an increase in the sentence within statutory limits.[374] Finally, the

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proposed 18 U.S.C. 3742, as has been argued by the ABA. (See Criminal Code Hearings, Part XVI, at 11891-907 (letter from George C. Freeman, Jr.).) That case involved a sentencing proceeding in a death penalty case in which the jury, in a proceeding separate from the trial, found that the prosecution had not proved beyond a reasonable doubt, as required by law, that aggravating factors required to be found to exist before the death penalty could be imposed, existed. The Supreme Court, in a 5 to 4 decision, found these findings by the jury to be, in effect, a jury finding that the defendant was acquitted of the aggravating factors necessary for imposition of a death sentence. *Id.* at 445. The Supreme Court distinguished the proceeding from other sentencing proceedings, which it has held not to be violations of double jeopardy, by noting the prosecution's burden of establishing new facts beyond a reasonable doubt in order to assist the jury in making a determination between two alternatives, a requirement that "*explicitly requires* the jury to determine whether the prosecution has proved its case!" *Id.* at 444 [emphasis in original].

[373] *United States* v. *DiFrancesco*, *supra* note 372 at 136–137.

[374] *Id.* at 138-39, distinguishing *Ex parte Lange*, 18 Wall. 163 (1874).

Court noted the growing criticism of arbitrary sentencing practices, and indicated that "Appellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing."[375]

2. *Provisions of the bill, as reported*

Section 3742 sets forth procedures for appeal in three cases: appeal of a sentence imposed in violation of law, appeal of a sentence that reflects an incorrect application of the sentencing guidelines promulgated pursuant to proposed 28 U.S.C. 994(a)(2); appeal of a sentence outside the guidelines; and appeal of a sentence in a case in which there is no guideline applicable to the offense committed. Either the defendant or the government may appeal a sentence imposed in violation of law, or through incorrect application of the guidelines, or imposed in the absence of an applicable guideline. The defendant may also appeal a sentence above the guidelines to the extent that it includes a greater fine or term of imprisonment or term of supervised release than the maximum provided in the applicable guideline, or to the extent that it includes a more limiting probation condition or condition of supervised release under 18 U.S.C. 3563 (b)(6) [376] or (b)(11) [377] than the maximum provided in the guidelines. Conversely, the government may appeal, on behalf of the public, a sentence below the applicable guideline to the extent that it includes a lesser fine or term of imprisonment or term of supervised release than the minimum in the guideline or a less limiting condition of probation or supervised release under 18 U.S.C. 3563 (b)(6) or (b)(11) than recommended in the guideline. Of course, a sentence consistent with a plea agreement cannot be appealed.

Under sections 3742 (a)(3)(B) and (b)(3)(B) both the defendant and the government may appeal a sentence where there is no guideline for the provision of law that the defendant has been convicted of violating. This would include the situations where there is a new law for which no guideline has yet been developed and where an appellate court had invalidated the established guideline and no replacement had yet been determined. A sentence not subject to a guideline is, therefore, open to broad appeal by both sides.

In previous versions of the bill, appeal of sentence was limited to felonies and Class A misdemeanors. The bill as reported provides for appeal in all cases which meet the criteria for appeal.

The Committee agrees with the Judicial Conference that a defendant who is imprisoned for a minor offense pursuant to an above-guideline sentence, would gain little comfort from knowing that he had been denied appellate rights because the offense for which he has been imprisoned is relatively minor.[378]

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[375] *Id.* at 142-143, citing M. Frankel, *Criminal Sentences: Law Without Order* (1973) and P. O'Donnell, M. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System* (1977).

[376] Proposed 18 U.S.C. 3563(b)(6) permits as a condition of probation or supervised release the barring of an individual from engaging in a business or profession related to his offense and restrictions relevant to the offense on the manner in which an individual or organization conducts a business or profession. See proposed 18 U.S.C. 3583.

[377] Proposed 3563(b)(11) permits as a condition of probation the incarceration of a defendant for evenings or weekends or other intervals of time in the first year of a sentence.

[378] Crime Control Act Hearings (statement of Judge Gerald B. Tjoflat, pp. 7–8).

The sentence review process under section 3742 begins under subsections (a) and (b) with the filing of notice of appeal of sentence with the district court. The government may petition for review of a sentence only with the personal approval of the Attorney General or the Solicitor General in order to assure that such appeals are not routinely filed for every sentence below the guidelines.

The limitations on both defendant and government appeal of sentences outside the guidelines based upon the size of the sentence imposed are further restrictions on the use of appellate review of sentences in order to avoid unnecessary appeals. Clearly, sentences at the bottom range are less likely to be abusive to defendants. The same applies to the government when sentences imposed approach the upper range of sentences recommended. The guidelines, therefore, provide a practical basis for distinguishing the cases where review is most needed from those where appeal would most likely be frivolous.

Both sections 3742(a) and 3742(b) refer to the sentence being appealed as an "otherwise final sentence". This language is in accord with the provisions of sections 3562(b), 3572(c), and 3582(b) regarding reviewability of sentences. Those sections make clear that a sentence to a fine, to a term of imprisonment, or to a term of probation is final except to the extent that it may be modified or corrected through subsequent court action. The Committee intends that a sentence be subject to modification through the appellate process, although it is final for other purposes.[379]

Under subsection (c), the clerk of the court that imposed the sentence shall certify to the court of appeals that portion of the record in the case that is designated as pertinent by either of the parties, the presentence report, and information submitted during the sentencing proceeding, including the court's statement of reasons as called for by section 3553(b).

Under subsection (d), upon review of the record, the court of appeals is to determine whether the sentence was imposed in violation of law; was imposed as a result of an incorrect application of the sentencing guidelines; or is outside the guidelines and is unreasonable, having regard for: (1) the factors to be considered in imposing a sentence, as set forth in chapter 227, and (2) the reasons for the sentence stated by the sentencing court.

Under subsection (e), if the court of appeals finds that the sentence was not imposed in violation of law, or as a result of incorrect application of the guidelines, and is not unreasonable, it is to affirm the sentence.

If the court determines that the sentence was imposed in violation of law or as a result of an incorrect application of the guidelines, it is required to remand the case for further sentencing proceedings or correct the sentence.

Finally, if the court determines that a sentence outside the guidelines is unreasonable and too high, and the appeal was filed by the defendant, it is to set aside the sentence and either impose a lesser sentence, remand for imposition of a lesser sentence, or remand for further sentencing proceedings.

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[379] See *United States* v. *DiFrancesco, supra* note 372 at 136-137.

If the court determines that a sentence outside the guidelines is unreasonable and too low, and the appeal was filed by the government, the court is to set aside the sentence and either impose a greater sentence, remand for imposition of a greater sentence, or remand for further sentencing proceedings. It should be noted that a sentence cannot be increased upon a section 3742(a)(3) appeal by the defendant.

As to the procedures to be followed, the Committee intends that the Federal Rules of Appellate Procedure be applicable to a proceeding under this section. Many of these rules will be applicable as they now exist; others may need modification. The Committee expects that the Judicial Conference and its Advisory Committees will issue specific proposed amendments to cover the details of these procedures where necessary.

The Committee believes that section 3742 creates for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences.[380]

Section 203(b) of the bill contains a technical amendment to the sectional analysis of chapter 235 of title 18.

Section 204 of the bill amends chapter 403 of title 18, United States Code, relating to juvenile delinquency, in order to conform it to the changes made in adult sentencing laws.

Section 204(a) of the bill amends section 5037 of title 18, United States Code, by replacing current subsections (a) and (b), relating to disposition after a finding of juvenile delinquency, with the disposition provisions from S. 1630 in the 97th Congress.[381]

Under proposed 18 U.S.C. 5037(a), if the court finds that a juvenile is a juvenile delinquent, the court is required to hold a disposition hearing within 20 days after the juvenile delinquency hearing. After the disposition hearing, the court may suspend the finding of juvenile delinquency, enter an order of restitution pursuant to section 3556, place the juvenile on probation, or commit him to official detention. The provisions of chapter 207 of title 18 are specifically made applicable to the decision whether to release or detain the juvenile pending an appeal or a petition for a writ of certiorari after the disposition.

Proposed 18 U.S.C. 5037(b) sets forth the probation terms for juveniles. If the juvenile is less than 18 years old, the probation term may not extend beyond the date when the juvenile becomes 21 or the maximum term that would be authorized under the adult probation statute if the juvenile had been tried and convicted as an adult. If the juvenile is between 18 and 21, the probation may not extend beyond three years or the maximum that would be authorized for an adult, whichever is less.

Proposed 18 U.S.C. 5037(c) provides the maximum periods for official detention of a juvenile found to be a juvenile delinquent. It parallels the 1974 Act provision set forth in current law for juveniles under 18 at the time of the proceeding. However, for juveniles between the ages of 18 and 21 at the time of the proceeding, the bill specifies that the term of official detention for a Class A, B, or C felony is a maximum of five years or the maximum sentence applicable to an adult offender.

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[380] See Subcommittee Criminal Code Hearings, Part XIII, at 8608, 8873, 8887, and 8953.
[381] See S. Rept. No. 97-307, at 1184-89.

Section 204(b) of the bill repeals section 5041 of title 18, United States Code, in light of the abolition of the parole system in Federal law. The section describes the role of the parole system in determining release dates under current law. It is expected that the time set at the disposition hearing for a juvenile placed in the custody of the Attorney General pursuant to 18 U.S.C. 5037(b) will represent the real time to be spent by the juvenile in a manner similar to that for adult offenders under the bill.

Section 204(c) amends section 5042 of title 18, relating to parole and probation revocation, by striking out references to parole and parolees.

Section (d) amends the sectional analysis of chapter 403 of title 18 to accord with the other amendments made by section 204.

Section 205 of the bill contains a number of amendments to the Federal Rules of Criminal Procedure that are necessitated by the amendments to the sentencing provisions.

Section 205(a) of the bill makes several changes in Rule 32, mostly to conform it to changes in the sentencing laws made by the bill. Certain provisions now found in current 18 U.S.C. 3653 have also been added to this rule in a revised form.

Subdivision (a)(1) of Rule 32, relating to the sentencing hearing, modifies the current requirement that a sentence be imposed without unnecessary delay by permitting the court, upon a joint motion of the defendant and the Government, to postpone the imposition of sentence for a period reasonably necessary to resolve an unresolved factor important to the sentencing determination. Such factors as cooperating with the Government, testifying against a codefendant, acting as an undercover agent, as well as providing otherwise unavailable information, may be important to the sentencing decision. This modification recognizes the interests of all concerned in weighing such factors prior to the sentencing hearing whenever possible. In addition, subdivision (a)(1) is amended to require that the court specify in open court and before imposing sentence the categories established in the sentencing guidelines promulgated by the Sentencing Commission that it believes apply to the defendant. Before imposing the sentence the court must also determine that the defendant and his attorney had sufficient time and opportunity to read and discuss the presentence investigation report. The court must give the defendant's counsel an opportunity to speak on his behalf and must also inquire of the defendant personally if he would like to make a statement on his own behalf or present any mitigating information.

Subdivision (a)(2) of the rule, as now in effect, imposes a duty upon the court to advise the defendant of his right to appeal in a case which has gone to trial on a plea of not guilty, but does not impose any such duty following a plea of guilty or nolo contendere. This basic approach is continued in subdivision (a)(2) of the amended rule with an addition made by section 205(a)(2) of the bill to cover the matter of advice regarding the defendant's right, if any, to obtain review of his sentence.

Subdivision (c) of the rule as now in effect governs the making of presentence investigations and reports prior to the imposition of sentence or "the granting of probation." It is no longer appropriate to treat sentencing and the granting of probation separately. Under proposed subchapter B of chapter 227 of title 18, the procedure of suspending the imposition or execution of sentence before placing a defendant on probation [382] has been abolished—probation has become a sentence in and of itself. Accordingly, Rule 32(c) has been rewritten to delete references to the granting of probation. However, the law is unchanged in that "sentence" is used in the rule to the same effect. For similar reasons this revised rule omits the reference now appearing in subdivision (d) to suspending the imposition of sentence.

Subdivision (c)(1) of Rule 32 is amended by section 205(a)(4) of the bill to require that a probation officer make a presentence investigation and report before imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553. This change is necessitated by the fact that it is essential that the judge have all the information he needs in order accurately to apply the sentencing guidelines. It is expected that the sentencing judge will ordinarily wish the sentencing report to be prepared to assist him in his sentencing decision.

Subdivision (c)(2) of Rule 32 is amended by section 205(a)(5) of the bill to spell out in some detail the information that should be included in the presentence report in order to assure the accurate application of the guidelines. This amendment assures that the information relating to the requirements of the sentencing guidelines system is contained in the presentence report. That part of Rule 32(c) relating to the contents of the presentance report has been substantially expanded from current law to provide that the report will contain, in addition to the information concerning the history and characteristics of the defendant (including his prior criminal record, if any, his financial condition, and any behavior characteristics pertinent to sentencing), the classification of the offense and defendant under the sentencing guidelines that the probation officer believes are applicable to the defendant, the kinds of sentence and the sentencing range under the guidelines that apply to those classifications, and any aggravating or mitigating circumstances the probation officer believes may indicate that a lower or higher sentence or a sentence of a different kind than that specified in the guidelines should be imposed.

Unless the court orders otherwise, possible nonprison programs available and appropriate for the defendant should be included in the report.

The bill also carries forward from the Victim and Witness Protection Act of 1982, requirements that the presentence report include information concerning harm, including financial, social, psychological, and physical harm, done to or loss suffered by the victim, and concerning restitution needs of the victim. The presentence report should also contain any policy statement of the Sentencing Commission pertinent to imposition of sentence on the defendant.

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[382] Current 18 U.S.C. 3651.

Subdivision (c)(3)(A) of Rule 32 has been amended by section 205 (a)(6) of the bill to assure that the information relating to the requirements of revised subdivision (c)(2) contained in the presentence report are made available to the defendant, but that the probation officer's final recommendation as to sentence is not made available. This assures that the defendant will receive information such as the probation officer's conclusions as to which guidelines apply to the defendant and whether there are aggravating or mitigating circumstances that may indicate that the sentence should be outside the guidelines, but will not receive the final sentencing recommendation of the probation officer. The latter provision represents a Committee amendment in the 97th Congress to S. 1630 made at the suggestion of Judge Tjoflat[383] who expressed concern that disclosure of the final sentencing recommendation might inhibit the probation officer in making the recommendations.

Section 205(b) amends Rule 35 of the Federal Rules of Criminal Procedure in order to accord with the provisions of proposed section 3742 of title 18 concerning appellate review of sentence. New subdivision (a) requires the court to correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the guidelines, or to be unreasonable. New subdivision (b) permits the court, on motion of the government, to lower a sentence within one year after its imposition to reflect a defendant's subsequent, substantial assistance in the investigaton or prosecution of another person who has committed an offense, to the extent that such assistance is a factor recognized in applicable guidelines or policy statements issued by the sentencing Commission.

Section 205(c) amends Rule 38 of the Federal Rules of Criminal Procedure in order to make technical changes necessitated by the enactment of provisions for appellate review of sentence.

At present, Rule 38 provides for the staying of sentences of death, imprisonment, the payment of a fine, and of an order placing a defendant on probation, "if an appeal is taken." Each of the relettered subdivisions of Rule 38 has been written to allow for stay of sentence if an appeal is taken from a conviction or a sentence. Moreover, since probation has been cast as a sentence, the phrase, "sentence of probation," has been used in subdivision (d) instead of "an order placing the defendant on probation." A new subdivision (e) has been added providing for a stay of sentence under section 3554 (Order of Criminal Forfeiture), 3555 (Order of Notice to Victims), or 3556 (Order of Restitution) if an appeal of the sentence is filed. The subdivision permits the court to issue reasonably necessary protective orders. Finally, a new subdivision (f) is added to stay a civil or employment disability arising under a Federal statute if it is appealed and to permit the court to take action necessary to protect the interest sought to be protected by the imposition of the disability pending disposition of the appeal.

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[383] Criminal Code Hearings, Part XVI, at 11921-22.

Section 205(d) of the bill makes a correction in a cross-reference in Rule 40 of the Federal Rules of Criminal Procedure.

Section 205(e) of the bill amends Rule 54 to redefine the term "petty offense" in subdivision (c) to refer to the grading of offenses prescribed by proposed section 3583 of title 18, and to add a definition of the word "grade" that specifies that the word grade includes the issue whether, for the purposes of section 3571 (relating to the sentence of fine), a misdemeanor resulted in the loss of human life.

Section 205(f) of the bill amends the table of rules of the Federal Rules of Criminal Procedure to accord with the other amendments to the rules.

Section 206 contains a number of technical amendments to the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates to take into account the new grading structure for Federal offenses.

Section 207(a) of the bill adds a new chapter 58 to title 28 of the United States Code. That chapter creates the United States Sentencing Commission and outlines its functions.

CHAPTER 58 OF TITLE 28—UNITED STATES SENTENCING COMMISSION

SECTION 991. UNITED STATES SENTENCING COMMISSION; ESTABLISHMENT AND PURPOSE

Proposed section 991 of title 28, United States Code, creates the United States Sentencing Commission and spells out its purposes. The Commission is established as an independent commission in the judicial branch, consisting of seven voting members appointed by the President by and with the advice and consent of the Senate. The Attorney General, or his designee, is an ex officio non-voting member of the Commission. Placement of the Commission in the judicial branch is based upon the Committee's strong feeling that, even under this legislation, sentencing should remain primarily a judicial function. At the same time, however, the Committee believes that sentencing policy should be formulated after examining a wide spectrum of views.

In order to assure a broadly representative membership on the Sentencing Commission, the Committee has provided that the President will select the members after consulting with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process. At least two of the members shall be Federal judges in regular active service selected from a list of six recommended candidates prepared for the President by the Judicial Conference of the United States.

This requirement that two of the Commission members be active Federal judges was included at the request of the Judicial Conference. The Committee had anticipated that some number of members of the Sentencing Commission would be judges. This amendment clarifies that intent.

The Chairman is to be appointed as such, and will remain for the duration of his term unless removed from office for malfeasance or neglect of duty.[384] All voting members are removable from the Commission by the President for malfeasance in office or neglect of duty.

In addition to the seven voting members, the Commission will have one permanent non-voting ex officio member, the Attorney General or his designee, and, under the provisions of section 225(b)(5) of this title, one temporary non-voting ex officio member, the Chairman of the United States Parole Commission.

The Commission should be a body which can cooperate in the promulgation of clear and consistent sentencing policy. By requiring consultation with various groups as to potential members of the Commission, it can be expected that they will represent some diversity of backgrounds.

The extraordinary powers and responsibilities vested in the Commission, as well as the enormous potential for unparalleled improvement in the fairness and effectiveness of Federal criminal justice as a whole, demand the highest quality of membership. For such a critical position, Presidential appointments based on politics rather than merit would, and should, be an embarrassment to the appointing authority. The Committee is convinced that without superior and professional members the Commission, and indeed sentencing reform, can never achieve the progress so sorely needed.

The Committee intends, and the important functions to be served by the Sentencing Commission require, the appointment and designation of highly qualified members to the Commission. Because of the complex nature of the functions of the Commission, and in order to avoid potential schedule conflicts for the members, the voting members' positions are full-time for the first several years [385] even if the member is a Federal judge.[386]

The Committee anticipates that the voting members of the Commission will form a number of committees which will have specific delegated responsibilities such as, for example, review of the effectiveness of probation and post-release supervision in carrying out the purposes of sentencing, monitoring of the application of the sentencing guidelines and policy statements, continuing refinement of the guidelines and policy statements, development of legislative proposals in the sentencing area, development and coordination of research studies (including, for example, basic research on sentencing theories as well as applied research on the effectiveness of certain policies), and review of the effectiveness of corrections programs of the Bureau of Prisons in carrying out the purposes of sentences of imprisonment. Such committees could be an invaluable source for developing recommendations for Commission action and for providing the information necessary for informed decisionmaking.

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[384] If the President wished to name another person as Chairman at the expiration of the Chairman's first term, but wished to retain the Chairman as a member of the Commission, he could appoint a new Chairman and reappoint the former Chairman as a member of the Commission.

[385] The judicial and other members may complete work on cases in progress if they are so far involved that it is impractical for the work to be turned over to another person. Of course, if the work was such that there was a potential conflict of interest or appearance of such a conflict, the work would have to be turned over to someone else.

[386] Pursuant to section 992(c), a Federal judge need not resign his appointment as a Federal judge while serving as a member of the Sentencing Commission.

Subsection (b) sets out the two basic purposes of the Sentencing Commission. The most important purpose of the Commission is the establishment of sentencing policies and practices for the Federal criminal justice system that are designed to meet three goals.

First, the policies and practices established should assure that, to the maximum extent possible, the Federal sentencing practices and policies carry out the four purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code. These purposes are deterrence, protection of the public from further crimes by the defendant, assurance of just punishment, and promotion of rehabilitation.

Second, the policies and practices are required to provide certainty and fairness in meeting the purposes of sentencing. In doing so, the policies and practices are required to avoid "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." This requirement establishes two factors—the prior records of offenders and the criminal conduct for which they are to be sentenced—as the principal determinants of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity that should be avoided unless it is warranted by other factors. The key word in discussing unwarranted sentence disparities is "unwarranted." The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records. The Commission is, in fact, required to consider a number of factors in promulgating sentencing guidelines to determine what impact on the guidelines, if any, would be warranted by differences among defendants with respect to those factors.[387] As discussed in the introduction of this report, the Committee believes that the sentencing guidelines system will enhance, rather than detract from, the individualization of sentences. Each sentence will be the result of careful consideration of the particular characteristics of the offense and the offender, rather than being dependent on the identity of the sentencing judge and the nature of his sentencing philosophy.

Third, the sentencing policies and practices are required to reflect, to the extent practicable, advancement in knowledge of human behavior in the context of the criminal justice process. This is an explicit recognition of the unfortunate fact that we do not know very much about how to deter criminal conduct or rehabilitate offenders. It also makes clear that the purposes set forth in subsection (b) are the goals to be reached by the sentencing process and that they cannot be realistically assured in every case. Subsection (b)(1)(C) is designed to encourage the constant refinement of sentencing policies and practices as more is learned about the effectiveness of different approaches.

The second basic purpose of the United States Sentencing Commission is to develop means of measuring the effectiveness of different sentencing, penal, and correctional practices in meeting the purposes of sentencing set forth in section 3553(a)(2) of title 18. This provision emphasizes the importance of sentencing and corrections research in the process of improving the ability of the Federal criminal justice system to meet the goals of sentencing.

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[387] 28 U.S.C. 994(d).

SECTION 992. TERMS OF OFFICE; COMPENSATION

Subsection (a) sets up a staggered system of appointments for the chairman and voting members of the Commission such that, once in operation, the Commission membership will be replaced, or reappointed, over a period of six years—at least two members, or one member and the chairman, every two years. This is achieved by making the initial appointments for three members to only four-year terms, and for two other members to only two-year terms, while the first chairman and one member serve full six-year terms. This staggered system should provide a desirable balance between continuity and the innovation and new perspectives that can come with a change in membership. Note that section 25(a) of the bill provides that while the rest of the Act shall become effective twenty-four months after the date of enactment, the Sentencing Commission is created immediately or on October 1, 1983, whichever occurs later. It also provides that for the purpose of determining when the initial terms end, the terms of the first members of the Commission shall not begin to run until the effective date of the sentencing guidelines; thus, the members appointed for the initial abbreviated terms of two or four years will not have their terms expire until two or four years after the new sentencing guidelines go into effect, and the members and chairman appointed to serve full six-year terms will count the effective date of the sentencing guidelines as the beginning of the term even though they may have actually been in office two years prior to that date. The delay is also a recognition that the initial appointments may occur at different times in spite of the desirability of expeditious appointments, and will permit all later appointment terms to run from an anniversary of the effective date of the guidelines.

Subsection (b) provides that a voting member may serve no more than two full terms, and that a member appointed to serve an unexpired term shall serve only the remainder of such a term. This also means that if a voting member is appointed to a term after it begins, and it has been vacant during the expired part, such member will also serve only the remainder of a term. If one of the original Commissioners appointed to an abbreviated two- or four-year term were reappointed, he could be reappointed a second time as well since the initial term was not a full term.

Subsection (c) establishes that the Sentencing Commission will be full-time during the first six years after the guidelines go into effect, after which all voting members will hold part-time positions, except for the Chairman, whose position remains full-time. The Chairman is to be compensated at the same annual rate as judges for the courts of appeals, as are the other voting members during the initial six years when their positions are full-time. When the Commission becomes part-time, voting members other than the

Chairman shall be paid at the daily rate at which courts of appeals judges are compensated.

In this Congress, the Committee decided that the Sentencing Commission should ultimately be part-time. This decision was made out of concern for the costs of maintaining a permanent full-time commission and the belief that once the initial guidelines are established and operating the responsibilities of the Commission can be discharged by part-time members. The State of Minnesota, which has experienced the greatest success among States which have adopted sentencing reform, has had a part-time Sentencing Commission since the inception of the Commission. The relatively greater magnitude of the task of developing Federal sentencing policies and guidelines demands a full-time effort through the implementation of the initial guidelines.

The bill specifically authorizes a Federal judge to be appointed as a member of the Commission without having to resign his appointment as a Federal judge. The Committee feels that this is appropriate since the judge will remain in the judicial branch and will be engaged in activities closely related to traditional judicial activities, and that such a provision is necessary to assure that highly qualified candidates are not routinely excluded in practice because of the substantial burden of having to resign a lifetime appointment in order to serve on the Sentencing Commission.

The non-voting ex officio members would, of course, receive no extra compensation for their roles on the Commission, but would receive travel expenses authorized by their agency if necessary to the performance of their duties with regard to the Commission.

SECTION 993. POWERS AND DUTIES OF CHAIRMAN

Section 993 provides that the Chairman, who is appointed as such by the President, with the advice and consent of the Senate, pursuant to section 991(a), is to call and preside at meetings of the Sentencing Commission. After the Commission becomes part-time, meetings shall be held for at least two weeks in each quarter of the year. The Chairman must also direct the preparation of appropriations requests and the use of funds by the Sentencing Commission.

SECTION 994. DUTIES OF THE COMMISSION

Subsection (a) requires the Sentencing Commission to promulgate sentencing guidelines and policy statements to be used by the sentencing judges in determining the appropriate sentence in a particular case. The sentencing guidelines and policy statements are to be promulgated pursuant to the rules and regulations of the Sentencing Commission [388] and must be consistent with all pertinent provisions of titles 18 and 28. Guidelines and policy statements must be adopted by the affirmative vote of at least four members of the Commission. Under subsection (a)(1)(A), the guidelines are required to provide guidance for the judge in determining whether to sentence a convicted defendant to probation, to pay a fine, or to a term of imprisonment. This guidance may prove to be one of the most important parts of the guidelines process, since current law provides no guidance or mechanism for guidance to judges on this crucial decision, leading to considerable unwarranted disparity which there is no mechanism to correct. The Parole Commission is now able to alleviate some of the disparity among sentences to terms of imprisonment; however, it has no jurisdiction to eliminate disparity among decisions whether or not to sentence convicted defendants to terms of imprisonment. The disparity is illustrated by the data in the following charge from the book, *Toward a Just and Effective Sentencing System:* [389]

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[388] See 28 U.S.C. 995(a)(1).

TABLE 2.—PERCENTAGE OF CONVICTED OFFENDERS PLACED ON PROBATION, 1972

	Homicide and assault	Robbery	Burglary	Larceny	Auto theft	Forgery and counterfeiting
National average	36	13	43	60	36	58
Maine				50 (−10)	0 (−36)	20 (−38)
Massachusetts	14 (−22)	17 (+4)	0 (−43)	77 (+17)	50 (+14)	53 (−5)
New York (northern)	100 (+64)	50 (+37)		54 (−6)	83 (+47)	62 (+4)
New York (eastern)	60 (+24)	16 (+3)	50 (−7)	52 (−8)	89 (+53)	62 (+4)
New Jersey	80 (+44)	6 (−7)	20 (−23)	64 (+4)	60 (+24)	66 (+8)
Pennsylvania	50 (+14)	18 (+5)		79 (+19)	80 (+44)	74 (+16)
Maryland	33 (−3)	7 (−6)	0 (−43)	79 (+19)	57 (+21)	67 (+9)
Virginia (eastern)	8 (−28)	6 (−7)	60 (+17)	53 (−7)	33 (−3)	52 (−6)
Florida (middle)	50 (+14)	0 (−13)	40 (−3)	47 (−13)	28 (−8)	45 (−13)
Texas (northern)	0 (−36)	4 (−9)	25 (−18)	51 (−9)	24 (−12)	41 (−17)
Kentucky (eastern)	50 (+14)	0 (−13)	0 (−43)	11 (−49)	8 (−28)	17 (−41)
Ohio (northern)	43 (+7)	10 (−3)	50 (+7)	67 (+7)	45 (+9)	68 (+10)
Illinois (northern)	43 (+7)	16 (+3)	0 (−43)	64 (+4)	50 (+14)	62 (+4)
Indiana (southern) [1]						
Missouri (eastern)	60 (+24)	7 (−6)	0 (−43)	51 (−9)	14 (−22)	58 (0)
Missouri (western)	0 (−36)	6 (−7)	100 (+57)	78 (+18)	47 (+11)	74 (+16)
California (northern)	29 (−7)	12 (−1)	50 (+7)	65 (+5)	25 (−9)	62 (+4)
California (central)	53 (+17)	21 (+8)	50 (+7)	75 (+15)	64 (+28)	79 (+21)
Kansas	10 (−26)	19 (+6)	100 (+57)	61 (+1)	35 (−1)	64 (+6)
Oklahoma (western)	18 (−18)	25 (+12)	0 (−43)	49 (−11)	21 (−15)	42 (−16)
District of Columbia	37 (+1)	16 (+3)	35 (−8)	49 (−11)	48 (+12)	54 (−4)

[1] No information was available for the southern district of Indiana.

Source: Administrative Office of the U.S. Courts, "Federal Offenders in U.S. District Courts, 1972," app. table X–4.

It has been suggested by some, as noted before, that the Parole Commission retain its assumed role of correcting sentencing disparities. The Parole Commission cannot correct the disparities in decisions as to the kind of sentence that should be imposed, however, and for this and several other more fundamental reasons that have been discussed in relation to the new subchapters A and D of chapter 227 of title 18, the Committee has not retained the Parole Commission. The Committee believes that the sentence provisions as a whole provide ample safeguards against unwarranted disparity without a requirement that the Parole Commission review the product of a series of decisions made by the Sentencing Commission, the Congress, the sentencing judge, and perhaps an appellate court. Indeed, retention of this function by the Parole Commission would undercut the sentencing guidelines before they are even put in place. For example, if there were parole eligibility for half a prison term, the Sentencing Commission probably would not know whether to issue guidelines that recommended prison terms that were twice as long as the Commission thought should be served or terms that reflected actual time to be served. If, despite the guidelines, the Parole Commission were to retain the power to release prisoners after a fixed eligibility period, it is likely that the sentencing judges would try to second-guess both the guidelines and the Parole Commission and, in fixing a defendant's sentence, try to determine when the offender actually would be released. It is hard to conceive of a step that would be more damaging to the entire sentencing system found in the reported bill.[390]

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[389] P. O'Donnell, M. Churgin, and D. Curtis, *Toward a Just and Effective Sentencing System* 5–6, Table 2 (1977).

Subsection (a)(1)(B) requires that the sentencing guidelines recommend an appropriate amount of fine or appropriate length of a term of probation or imprisonment. In recommending an appropriate fine, the Commission could, of course, provide a formula or set of principles for determining an appropriate fine relative to the damage caused, the gain to the defendant, or the ability of the defendant to pay, consistent with the flexibility possible because of the high maximum fines set forth in proposed subchapter C of chapter 227 of title 18, United States Code, rather than specifying a dollar amount of fine.

Subsection (a)(1)(C) requires that the sentencing guidelines recommend whether a category of defendant convicted of a particular offense who is sentenced to a term of imprisonment should be required to serve a term of supervised release, and, if so, what length of term is appropriate.

The Committee added a new subsection (a)(1)(D) in S. 1630 in the 97th Congress that requires that the sentencing guidelines include recommendations as to whether sentences to terms of imprisonment should be ordered to run concurrently or consecutively. The Committee has taken this approach instead of the approach in earlier versions of the bill that set, in section 3584 of title 18, a ceiling on the maximum term of imprisonment that could be imposed for multiple offenses. The Committee believes that the new provision when read with the revised version of 28 U.S.C. 994(*l*) will lead to carefully considered determinations as to the appropriateness of concurrent, consecutive, or overlapping sentences in cases of multiple offenses.

The list of determinations concerning which the guidelines should make recommendations is not necessarily inclusive. For example, the Sentencing Commission may wish to make recommendations in the guidelines in some cases as to, for example, a requirement of restitution or a particularly appropriate condition of probation for a category of offender convicted of a particular offense.

Under subsection (a)(2), the Commission is required to issue general policy statements concerning application of the guidelines and other aspects of sentencing and sentence implementation that would further the ability of the Federal criminal justice system to achieve the purposes of sentencing set forth in section 101(b) of title 18. The policy statements are required to address the questions of the appropriate use of: the sanctions of order of criminal forfeiture,[391] order of restitution,[392] and order of notice to victims,[393] conditions of probation,[394] and supervised release,[395] sentence modification provisions for fines,[396] probation,[397] and imprisonment,[398] authority under Rule 11(e) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement; and temporary release under proposed section 3622 of title 18 and prerelease custody under proposed section 3624(c) of title 18. These policy statements could also address, for example, such questions as the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which does not occur sufficiently frequently to be incorporated in the guidelines themselves, and could describe factors that the Sentencing Commission found should *not* affect a sentence. The policy statements might also address such issues as the kind of recommendations a judge might make pursuant to proposed section 3582(a) of title 18 to the Bureau of Prisons as to an appropriate prison facility for a defendant committed to its custody. Another important function of the policy statements might be to alert Federal district judges to existing disparities which are not adequately cured by the guidelines, while offering recommendations as to how such situations should be treated in the future.

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[390] See, e.g., Subcommittee Criminal Code Hearings, Part XIII, at 8579, 8595, 9021 (testimony of former Judge Harold Tyler before the House Judiciary Subcommittee on Criminal Justice, October 11, 1979); letter from Judge Jon O. Newman, United States Court of Appeals for the Second Circuit, to Congressman Robert F. Drinan, Chairman, House Judiciary Subcommittee on Criminal Justice, dated September 14, 1979; letter to the Editor, The New York Times, November 15, 1979, from Marvin E. Frankel, Norval Morris, and Alan Dershowitz. See also Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353, 377 (1979).

Another area in which the Sentencing Commission might wish to issue general policy statements concerns the imposition of sentence upon organizations convicted of criminal offenses. Under proposed section 3551(c), such an organization may be sentenced to probation pursuant to proposed subchapter B of chapter 227, to pay a fine pursuant to proposed subchapter C of chapter 227, to forfeit property pursuant to proposed 18 U.S.C. 3554, to give notice to victims pursuant to proposed 18 U.S.C. 3555, to make restitution pursuant to proposed 18 U.S.C. 3556, or to any combination of such penalties that the sentencing judge deems fitting under the circumstances. Given the breadth of discretion thus available to the court in the context of sentencing an organizational defendant, the Committee believes that it would be appropriate for the Sentencing Commission, by means of policy statements, to provide guidance to sentencing judges concerning such matters as: (1) considerations relevant to the coordination of criminal sanctions imposed with any civil remedies that may be available under the circumstances; (2) considerations relevant to the imposition of sanctions involving forfeiture, notice to victims, and restitution; and (3) considerations relevant to the selection of conditions of probation involving such judicial monitoring of the activities of a convicted organization as may be appropriate under the circumstances of the case.[399]

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[391] Proposed 18 U.S.C. 3554.

[392] Proposed 18 U.S.C. 3556.

[393] Proposed 18 U.S.C. 3555.

[394] Proposed 18 U.S.C. 3563.

[395] Proposed 18 U.S.C. 3583(d) and 3563.

[396] Proposed 18 U.S.C. 3573.

[397] Proposed 18 U.S.C. 3563(c).

[398] Proposed 18 U.S.C. 3582(c).

[399] See, for example, American Bar Association recommendations, Criminal Code Hearings, Part XVI, at 11855–58, 11877–78, 12354–56.

Under subsection (a)(3), the Sentencing Commission is required to issue either guidelines or policy statements concerning the appropriate use of probation revocation under proposed 18 U.S.C. 3565, and of the provisions for modification of the term or conditions of probation or supervised release under proposed 18 U.S.C. 3563(c), 3564(d), and 3583(e).

The provision of subsection (a)(2)(D), concerning the issuance of policy statements with regard to plea acceptance, is especially important. The guideline sentencing provisions of S. 1437 in the 95th Congress were criticized on the ground that, while structuring and rationalizing the exercise of judicial sentencing discretion, they did not also address the exercise of prosecutorial discretion at the charging and plea agreement stages of criminal proceedings. As a result of this omission, it was claimed, prosecutorial decisions—particularly decisions to reduce charges in exchange for guilty pleas—could effectively determine the range of sentence to be imposed, and could well reduce the benefits otherwise to be expected from the bill's guideline sentencing system.

One approach that has been suggested for dealing with this situation is to have sentencing judges review charge-reduction plea agreements to ensure that such agreements do not result in undue leniency or unwarranted sentencing disparities.[400] Subsection (a)(2)(D), in combination with the bill's modification of Rule 11(e) of the Federal Rules of Criminal Procedure (to clarify that the Rule covers withholding of charges as well as dismissal of charges) and the addition of subsection (q) of section 994 (to require careful attention by the Sentencing Commission to the effects of plea agreements on sentencing under the new act), is intended to implement this suggestion. It would require the Sentencing Commission to promulgate policy statements for use by a sentencing court in determining whether, pursuant to Rule 11(e)(2), to accept a charge-reduction agreement described in Rule 11(e)(1). This approach is intended to provide an opportunity for meaningful judicial review of proposed charge-reduction plea agreements, as well as other forms of plea agreements, while at the same time to guard against improper judicial intrusion upon the responsibilities of the Executive Branch.

It should be noted that a sentence that is inconsistent with the sentencing guidelines is subject to appellate review,[401] while one that is consistent with guidelines but inconsistent with the policy statements is not. This is not intended to undermine the value of the policy statements. It is, instead, a recognition that the policy statements may be more general in nature than the guidelines and thus more difficult to use in determining the right to appellate review. Nevertheless, the sentencing judge is required to take the policy statements into account in deciding what sentence to impose [402] and it is expected that the policy statements will be consulted at all stages of the criminal justice system, including the appellate courts, in evaluating the appropriateness of the sentence and corrections program applied to a particular case.

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[400] See S. Schulhofer, *Prosecutorial Discretion and Federal Sentencing Reform*, Report for Federal Judicial Center (August 1979).

[401] See proposed 18 U.S.C. 3742.

[402] See proposed 18 U.S.C. 3553(a)(5).

Under subsection (b), the Commission is to devise categories based on characteristics of the offense and categories based on characteristics of the offender.[403] For each combination of a category of offense and a category of offender, a sentence or sentencing range is to be recommended that is consistent with all pertinent provisions of title 18 of the United States Code.

This subsection is of major significance. It contemplates a detailed set of sentencing guidelines, to be used as indicated in subsection (a) and proposed subchapters A through D of chapter 227 of title 18, that are designed to achieve the purposes of sentencing set forth in title 18. The Committee expects that there will be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances. There would be expected to be, for example, several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances.[404] The guidelines may be designed and promulgated for use in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices. Whatever their form, the general logic underlying the effects of individual factors would presumably be apparent, or at least would be traceable to Sentencing Commission determinations. The result should be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results.[405] Whether the Sentencing Commission concludes that it should promulgate, for example, a separate guidelines matrix for each statute describing an offense, or one guidelines matrix for property offenses and another for offenses against the person, the result will be sets of guidelines considerably more detailed than the existing parole guidelines.

The subsection requires that, if the guidelines recommend a term of imprisonment for a particular category of offense committed by a particular category of offender, the maximum of the sentencing range recommended may not exceed the minimum of that range by more than 25 percent. For a particular penal offense, therefore, while there might be numerous guideline ranges, each keyed to one or more variations in relevant factors, no one particular guideline range may vary by more than 25 percent from its minimum to its maximum; all the ranges together, however, would be expected to cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense. The breadth of the sentencing range provided in each guideline is a matter for the Commission to decide so long as it is within the 25-percent limit specified in subsection (b). The range may be narrow where the purposes of sentencing can be served by a single sentence or a narrow range of sentences in all similar cases. The range may necessarily be broader where miscellaneous factors not entirely provided for in the guidelines may change the appropriate sentence in a particular case. A range may also be broad where no such factors exist, but where the Commission is not sufficiently confident in its judgment as to the appropriate sentence to suggest a narrow range. For this group of cases, the guideline range might well become more narrow as, over time, the Commission is able to refine its guidelines.

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[403] Subsections (c) and (d) suggest factors that the Commission might conclude are pertinent to the sentencing decision.

[404] For example, it is possible in some cases that the sentencing recommendation for a particular type of case will vary as to length or type of sentence because different purposes of sentencing apply to different categories of offenders convicted of basically similar offenses.

[405] In developing the form in which the guidelines are to be used, the Committee expects that the Commission will undertake an evaluation to assure that the guidelines are not so complex as to detract from their effective use.

The Commission is free to include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing. The Committee is aware that guidelines addressing this broad range of sentencing alternatives—rather than just the length of terms of imprisonment, for example, covered by the current Parole Commission guidelines—will be difficult to develop. That is true especially in view of the 25-percent limitation on the difference between the maximum and minimum terms of imprisonment specified in a single guideline range. The Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors. By so doing, the Commission will be able to maintain the proper relationship between its function and that of the courts of appeals in contributing to purposeful and consistent sentencing. It is for these reasons, among others, that the Commission is to be created 24 months before the guidelines are to be put into use, and that the Commission will have full-time members and an extensive research capability.

Subsection (c) lists a number of offense characteristics that the Sentencing Commission is required to examine for the purpose of determining whether and to what extent they are pertinent to the establishment of categories of offenses for use in the sentencing guidelines and policy statements dealing with the nature, extent, place of service, or other incidents of an appropriate sentence. The Commission is required to determine whether and to what extent each factor might be pertinent to the question of the kind of sentence that should be imposed; the size of a fine or the length of a term of probation, imprisonment, or supervised release; and the conditions of probation, supervised release, or imprisonment. The Sentencing Commission may conclude, with respect to any of the listed factors, that, for example, the factor should not play a role at all in sentencing for a particular purpose. The Sentencing Commission is also required under subsection (c) to determine whether other factors not specifically listed are relevant to the sentencing decision.

Subsection (c)(1) specifies that the Commission consider the degree of relevance of the grade of the offense to the sentencing decision. As discussed in connection with proposed section 3581 of title 18, all offenses are graded according to their relative seriousness. This does not mean that the Committee intends that offenses with the same grade necessarily have the same sentence.[406] It is intended instead that the grading be some guide as to the Congress view of the relative seriousness of similar offenses. The rough approximations practical for statutory purposes are expected by the Committee to be refined considerably by the sentencing guidelines.[407]

Subsection (c)(2) specifies that the Commission consider the relevance to the sentencing decision of the circumstances under which the offense was committed that might aggravate or mitigate the seriousness of the offense. Among the considerations the Commission might examine under this factor are whether the offense was particularly heinous; whether the offense was committed on the spur of the moment or after substantial planning; whether the offense was committed in reckless disregard of the safety of others; whether the offense involved a threat with a weapon or use of a weapon; whether the offense was committed in a manner plainly designed to limit the danger to the victims; whether the defendant was acting under a form of duress not rising to the level of a defense; etc.

Subsection (c)(3) specifies that the Commission consider the relevance to the sentencing decision of the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust. The Commission might include in this consideration, or in policy statements, an evaluation of the role that unusual vulnerability of the victim that is known to the defendant should play in the sentencing decision.

Subsection (c)(4) specifies that the Commission consider the relevance of the community[408] view of the gravity of the offense to the sentencing decision, and subsection (c)(5) specifies consideration of the public concern generated by an offense. These suggestions are not intended to mean that a sentence might be enhanced because of public outcry about a single offense. It is intended, instead, to suggest that changed community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense. Two recent examples of action by the Parole Commission with regard to its guidelines suggest the kinds of situations in which the Commission might wish to reflect the community view of an offense in its guidelines: the Parole Commission has in recent years lowered the guidelines parole dates applicable to simple possession of marihuana, and, following the Vietnam War, lowered the guidelines parole dates for draft violations. Similarly, if there were a substantial increase in the rate of commission of a very serious crime, the public concern generated by that increase might cause the Commission to conclude that the guidelines sentences for the offense should be increased.

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[406] This is especially true since the bill does not attempt to regrade current law offenses according to their relative seriousness, but leaves consideration of these issues to a later day.

[407] The Committee hopes that the process of developing the guidelines will lead to recommendations by the Sentencing Commission as to appropriate grades for the offenses contained in Federal law.

[408] The community might be national or it might be regional. It is expected that, while nationwide consistency in sentences in Federal cases is generally desirable, in certain situations the Commission may find it appropriate to draft the guidelines to take account of considerations based on pertinent regional differences.

Subsection (c)(6) specifies that the Commission consider the relevance to the sentencing decision of the deterrent effect a particular sentence may have on the commission of the offense by others. Thus, the Commission might conclude, for example, that there was an increase in the incidence of a particular offense that justified an increase in the guidelines sentences for the offense in order to deter others from committing the offense. The Commission might also conclude, on the basis of further research, that some kinds of offenses may be more easily deterred than others, and that this might appropriately be reflected in the guidelines.

Subsection (c)(7) specifies that the Commission consider the relevance to the sentencing decision of the current incidence of the offense in the community and in the Nation as a whole.

Subsection (d) lists a number of offender characteristics that the Sentencing Commission is required to examine in order to determine whether and to what extent they are pertinent to the establishment of categories of offenders for use in the sentencing guidelines and policy statements concerning the nature, extent, place of service, or other incidents of an appropriate sentence. The Commission is required to determine whether and to what extent each factor might be pertinent to the question of the kind of sentence that should be imposed; the size of a fine or the length of a term of probation, imprisonment, or supervised release; and the conditions of probation, supervised release, or imprisonment. The Sentencing Commission may conclude, with respect to any of the listed factors, that, for example, the factor should not play a role at all in sentencing for a particular purpose, or that, for example, it is relevant to the type of prison facility to which a defendant is sent if he is sentenced to a term of imprisonment, but is not relevant to the question whether he should be sentenced to a term of imprisonment, probation, or a fine. The Sentencing Commission is also required under subsection (d) to determine whether other factors not specifically listed are relevant to the sentencing decision.

Subsection (d) contains a specific provision that "The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders.[409] The Committee added the provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training.[410]

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[409] The requirement of neutrality with regard to such factors is not a requirement of blindness. In sentencing a person to imprisonment it would be appropriate to have a judge consider, for example, recommending placement in an institution equipped to accommodate the religious dietary laws followed by the defendant, or an institution housing prisoners of the defendant's sex.

[410] Indeed, in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training. This

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Subsection (d)(1) specifies that the Commission consider what effect the age of the defendant should have on the sentencing decision. The factor derives in part from the fact that, under the Youth Corrections Act and the young adult offender provisions in current law, the youth of an offender frequently plays a role in the sentencing decision. This role may, depending upon the way in which the current law provisions are applied, result in a more harsh or less harsh sentence than a regular adult offender would receive for the same offense committed under similar circumstances. The sentence might be more harsh today if the defendant is sentenced to an indeterminate sentence under 18 U.S.C. 5010(b) for a relatively minor offense. Under 18 U.S.C. 5017(c), such a defendant is required to be released upon parole in no more than four years, and to be unconditionally released in six years, yet this sentence could apply to an offense for which an adult might be sentenced, for example, to only one or two years in prison. Conversely, if the young offender is sentenced for a more serious offense under the Youth Corrections Act provisions that permit the imposition of a sentence up to that applicable for the same offense if committed by an adult, he may actually serve less time in prison than his adult counterpart—the parole guidelines that apply to persons sentenced under the Youth Corrections Act for all but the least serious offenses provide earlier parole release dates than for an adult convicted of an offense with the same severity rating who has the same "parole prognosis" or "salient factor" score. An additional problem with the Youth Corrections Act is that judges are inconsistent in their use of the sentencing provisions of the Act. For example, some judges use the Act's sentencing provisions for most youthful offenders, while others will not use it for those involved in serious felonies. The Committee believes that, while consideration of youth in determining the appropriate sentence may be justified, the consideration should be employed in a much more rational and consistent way than it is today. Accordingly, the bill repeals the Youth Corrections Act and the young adult offender sentencing provisions and requires the Sentencing Commission in subsection (d)(1) to consider, in promulgating the sentencing guidelines and policy statements, what effect age—including youth, adulthood, and old age—should have on the "nature, extent, place of service, or other incidents of an appropriate sentence."

Subsection (d)(2) specifies that the Commission determine what effect, if any, the education of the offender should have on the nature, extent, place of service, or other incidents of an appropriate sentence. Subsection (e) specifies that education should be an inappropriate consideration in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of such a term. The Commission might conclude, however, that the need for an educational program might call for a sentence to probation if such a sentence were otherwise adequate to meet the purposes of sentencing, even in a case in which the guidelines might

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qualifying language in subsection (d), when read with the provisions in proposed section 3582(a) of title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a defendant should not be sent to prison only because the prison has a program that "might be good for him."

otherwise call for a short term of imprisonment. Clearly, education considerations will play an important role in such determinations as the conditions of probation or supervised release, the nature of the prison facility to which an offender is sent, and the type of programs to be made available to an offender in prison.[411]

Subsection (d)(3) specifies that the Commission determine the effect, if any, that the vocational skills of the offender should have on the incidents of the sentence. The considerations for the Commission, including the restrictions of subsection (e), are similar to those for the education factor.

Subsection (d)(4) specifies that the Commission shall determine what effect, if any, the defendant's "mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant" should have on the attributes of the sentence. The Commission might conclude that a particular set of offense and offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment. Consideration of this factor might also lead the Commission to conclude, in a particularly serious type of case, that there was no alternative for the protection of the public but to incarcerate the offender and provide needed treatment in a prison setting.

Subsection (d)(5) requires consideration of the defendant's physical condition, including drug dependence. Drug dependence, in the Committee's view, generally should not play a role in the decision whether or not to incarcerate the offender. In an unusual case, however, it might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison, for "drying out," as a condition of probation. Other health problems of the defendant might cause the Commission to conclude that in certain circumstances involving a particularly serious illness a defendant who might otherwise be sentenced to prison should be placed on probation. This is consistent with the provision of proposed section 3582(c) permitting the Director of the Bureau of Prisons to petition the court for reduction of a term of imprisonment in a compelling case, such as terminal cancer. Of course, the physical condition of the defendant would play an appropriate role in the determination of the conditions of probation and the programs that would be made available to the defendant in prison, such as drug or alcohol treatment programs. It should be noted that drug treatment programs at the present time are made available to prisoners on a voluntary basis, but are not required since prison officials have yet found no way to make compulsory programs effective.

Subsection (d)(6) specifies that the Commission should consider the relevance of the defendant's employment record to the attributes of sentence. The considerations here, including the provisions of subsection (e), are similar to those for the education and vocational skill of the defendant.

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[411] A defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release.

Subsection (d)(7) specifies that the Commission consider the extent to which family ties and responsibilities are pertinent to the sentencing decision. As stated in subsection (e), the Committee believes that the factor is generally inappropriate in determining to sentence a defendant to a term of imprisonment or in determining the length of a term of imprisonment. The Commission certainly could conclude, however, that, for example, a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family. Even more frequently, perhaps, family ties might play a role in such matters as the location of the prison facility in which a prisoner is to be housed, the use of furlough, and the location of pre-release custody.

Subsection (d)(8) specifies that the Commission consider the extent to which community ties are pertinent to the sentencing decision. Under subsection (e), the Committee again has found that this factor is generally inappropriate in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of a term of imprisonment. Like family ties and responsibilities, this factor could play a role in determining in which prison facility a defendant might be incarcerated.

Subsection (d)(9) specifies that the Commission is to consider the extent to which the defendant's role in the offense should affect the sentencing decision. This factor includes such matters as whether the defendant initiated the offense or followed someone else's lead, or whether the defendant was a major participant or acted only in a minor capacity. The Commission might reasonably conclude that the answers are important in determining both the nature of the sentence and its length and conditions.

Subsection (d)(10) specifies that the Commission consider the extent to which the defendant's criminal history should affect his sentence. This factor includes not only the number of prior criminal acts—whether or not they resulted in convictions—the defendant has engaged in, but their seriousness, their recentness or remoteness, and their indication whether the defendant is a "career criminal" or a manager of a criminal enterprise.

Subsection (d)(11) specifies that the Commission consider the relevance to the sentencing decision of the degree of the defendant's dependence on criminal activity for a livelihood.

Subsections (e) through (m) of section 994 contain general statements of legislative direction for the Commission to follow in promulgating guidelines.

Subsection (e) specifically requires that the Sentencing Commission insure that the sentencing guidelines and policy statements reflect the "general inappropriateness" of considering education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or the length of a term of imprisonment. As discussed in connection with subsection (d), each of these factors may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community.

The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties. It should be emphasized, however, that the Committee decided to describe these factors as "generally inappropriate," rather than always inappropriate, to the decision to impose a term of imprisonment or determine its length, in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration. The Committee believes that it is important to encourage the Sentencing Commission to explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate professional analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise. There are sufficient checks built into the system to avoid aberrations, and thus the guidance in this subsection is cautionary rather than proscriptive.

Subsection (f) directs that the Commission, in promulgating sentencing guidelines, promote the purposes of the guidelines, particularly the avoidance of unwarranted sentencing disparity.[412]

Subsection (g) directs the Commission, in promulgating sentencing guidelines pursuant to subsection (a)(1), to seek to satisfy the purposes of sentencing, taking into account the nature and capacity of the penal, correctional, and other facilities and services available. The purpose of the requirement is to assure the most appropriate use of the facilities and services to carry out the purposes of sentencing, and to assure that the available capacity of the facilities and services is kept in mind when the guidelines are promulgated. It is not intended, however, to limit the Sentencing Commission in recommending guidelines that it believes will best serve the purposes of sentencing. Instead, it is intended that the Commission be aware of the system's capacity in order to assure that it is not inadvertently exceeded, and that the Commission make recommendations as to any changes in that capacity that it believes to be necessary in light of its sentencing guidelines.

Subsection (h) was added to the bill in the 98th Congress to replace a provision proposed by Senator Kennedy enacted in S. 2572, as part of proposed 18 U.S.C. 3581, that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

Subsection (i) requires that the sentencing guidelines provide a substantial term of imprisonment for a convicted defendant who fits into one of five categories: a defendant who has a history of prior Federal, State, or local felony convictions for offenses committed on different occasions; a defendant who has committed the offense as part of a pattern of criminal activity from which he derived a substantial portion of his income; a defendant who committed the offense in furtherance of a conspiracy with three or more persons engaging in racketeering activity in which the defendant played a managerial role; a defendant who committed a violent felony while on pretrial release or release while awaiting sentence or appeal for another felony; or a defendant who committed an offense described in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), if the offense involved a substantial quantity of controlled substances. The first three categories are derived from the dangerous special offender sentencing provisions now contained in 18 U.S.C. 3575(e) and the dangerous special drug offender provisions of 21 U.S.C. 849(e). However, rather than providing enhanced sentences above the maximum sentence provided for any other similar offense, as is done in current 18 U.S.C. 3575(b), section 994(i) requires that the guidelines insure a substantial sentence to imprisonment that is nevertheless within the range generally available for the offense. The fourth category was added on the Senate Floor as an amendment to S. 1437 in the 95th Congress. The fifth category was added to S. 1630, as introduced, in order to assure a substantial term of imprisonment for major drug traffickers. It should be noted that subsections (h) and (i) are not necessarily intended to be an exhaustive list of types of cases in which the guidelines should specify a substantial term of imprisonment, nor of types of cases in which terms at or close to authorized maxima should be specified.

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[412] The parole guidelines were a pioneering effort to bring uniformity to parole decisions, which they have been fairly successful in doing. They were developed, however, from past decisions. The sentencing guidelines will differ significantly in their substance and in their theoretical base. They will require reevaluation of all underlying policies.

Subsection (j) requires the Sentencing Commission to insure that the guidelines reflect the general appropriateness of a sentence other than imprisonment for a first offender whose offense is not a crime of violence or an otherwise serious offense,[413] and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

Subsection (k) makes clear that a sentence to a term of imprisonment for rehabilitative purposes is to be avoided. A term imposed for another purpose of sentencing may, however, have a rehabilitative focus if rehabilitation in such a case is an appropriate secondary purpose of the sentence.

Subsection (*l*) directs the Commission to promulgate guidelines that reflect the appropriateness of imposing an incremental penalty for each offense if a defendant is convicted of a number of offenses that are part of the same course of conduct, and if a defendant is convicted of multiple offenses committed at different times, including cases in which the subsequent offense is a violation of 18 U.S.C. 3146, relating to bail jumping, or is committed while the person is on pretrial release pursuant to section 3502 of title 18. If no such incremental penalty were provided (e.g., were all sentences to be imposed without regard to the commission of other offenses and made to run concurrently), an offender who commits one offense would be faced with no deterrent to the commission of another during the interval before he is called to account for the first.[414] It is the Committee's intent that, to the extent feasible, the sentences for each of the multiple offenses be determined separately and the degree to which they should overlap be specified. Under this approach, if the conviction for one of the offenses is overturned, it will be unnecessary to recalculate the sentence.

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[413] The similar provisions of S. 1437, as introduced in the 95th Congress, applied only to defendants under the age of twenty-six at the time of sentencing.

Subsection (*l*) also requires that the guidelines reflect the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit or soliciting the commission of an offense and for an offense that was the sole object of the solicitation or conspiracy.

Subsection (m) requires that the Commission insure that the guidelines reflect that in many cases current sentences do not accurately reflect the seriousness of the offense. The Commission is directed, as a starting point, to ascertain the average sentence imposed for different categories of cases and the average length of time served in prison when such terms were imposed,[415] but the bill makes clear that the Commission need not follow the current average sentences if it finds that they do not adequately reflect the purposes of sentencing set forth in proposed 18 U.S.C. 3553(a)(2). It is not intended that the Sentencing Commission necessarily continue to follow the average sentencing practices of the past. It is intended that the Commission learn what those practices were in order more effectively to evaluate the appropriateness of continuing or changing past practices.[416] The Commission might conclude that a category of offenders, for example, first offenders convicted of a particular nonviolent offense that did not involve substantial harm to the victim, were too frequently sentenced to terms of imprisonment, and that for many of them a term of probation might sufficiently carry out the punishment, deterrence, incapacitation, and rehabilitation purposes necessary, particularly if a fine, restitution or community service substantial enough to reflect the seriousness of the offense were imposed as a condition. On the other hand, the Commission might conclude that a category of major white collar criminals too frequently was sentenced to probation or too short a term of imprisonment because judges using the old rehabilitation theory of sentencing, did not believe such offenders needed to be rehabilitated and, therefore, saw no need for incarceration. The Commission might conclude that such a category of offenders should serve a term of imprisonment, or a longer term than currently served, for purposes of punishment and deterrence. The Commission might also conclude that a particular category of violent crime or drug trafficking is not punished sufficiently severely today, and might reflect this conclusion in the guidelines. Finally, the Commission might conclude that there was insufficient data for a particular combination of offense and offender characteristics on which to base a policy decision on the appropriateness of the existing sentencing pattern. For example, the number of persons convicted of a particularly serious violent offense in the Federal system might not be large enough for the data on that category of offense to give an accurate picture of the sentencing practices for that offense, in which case the Sentencing Commission would have to exercise its best judgment as to what sentences would adequately reflect the purposes of sentence.

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[414] See the discussion of proposed 18 U.S.C. 3584, *supra*.

[415] With the elimination of early parole release it is absolutely essential that the Commission not be unduly influenced by the lengths of sentences of imprisonment imposed today. A Federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one-third of the sentence. The Commission should concern itself, instead, with the length of time convicted defendants actually spend in prison today—this length of time provides a considerably more accurate picture of actual sentencing practices than does the sentence imposed.

[416] See B. Forst, W. Rhodes, and C. Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines*, 7 Hofstra L. Rev. 355 (1979).

Subsection (n) requires the Commission continually to update its guidelines and to consult with a variety of interested institutions and groups. This revision and refinement of the guidelines will represent the bulk of the Commission's work once the initial guidelines and policy statements are promulgated. This task will be a formidable one because it includes a continuing effort to refine the guidelines to best achieve the purposes of sentencing. It requires continually updating the guidelines to reflect current views as to just punishment, and to take account of the most recent information on satisfying the purposes of deterrence, incapacitation, and rehabilitation. Perhaps most importantly, this provision mandates that the Commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with. In a very substantial way, this subsection complements the appellate review section by providing effective oversight as to how well the guidelines are working. The oversight would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes.

Even without advancements in our ability to increase the effectiveness of various corrections programs for criminal offenders, much can be done to have ongoing guidelines take fullest advantage of the capability we do have. For example, sound statistical studies on the effectiveness of certain sanctions or treatment programs can be used to increase or decrease use of those particular sentencing alternatives. Recognition of the dimensions of the task is reflected in the extensive powers given the Commission under proposed 28 U.S.C. 995, particularly as they relate to research.[417]

Subsection (o) requires that proposed amendments to the guidelines be reported, along with a report of the reasons for the recommended amendments, to the Congress at or after the beginning of a session of Congress but no later than the first of May, and provides that the amendments are to take effect 180 days after they have been reported to Congress unless the effective date is enlarged or the guidelines are disapproved or modified by an Act of Congress.

Subsection (p), one of the provisions inserted by the Committee at the suggestion of Senator Biden in the 96th Congress, requires the Sentencing Commission and the Bureau of Prisons to conduct a thorough analysis of the optimum utilization of resources to deal with the Federal prison population, and to report to the Congress on the results of that study. In conducting the study, the Commission and the Bureau are required to examine a variety of alternatives, including modernization of existing facilities; inmate classification, and periodic review of the classification, to place inmates in the least restrictive facility necessary to insure adequate security; and use of existing Federal facilities, such as those within military jurisdiction.

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[417] *Ibid.*

Subsection (q) requires the Commission to make recommendations to the Congress concerning raising or lowering grades for offenses, or otherwise modifying the maximum penalties for offenses. The first set of recommendations is to be made within three years of the date of enactment of the bill, with later recommendations to be made as advisable. The Committee believes that the Commission will be in a particularly good position to make such recommendations to the Congress. It will be able to make recommendations based on such considerations as, for example, the fact that, for a particular category of offenses, the Commission never found it advisable to recommend a term of imprisonment even close to the maximum for the grade of offense, suggesting that the offense was overgraded. It might also find for a particular offense that the guidelines could not recommend what the Commission felt was an appropriately high sentence because the offense was graded too low. It might also find at a later date a need for recommending increased fine levels because the fine levels set forth in section 3571 of title 18 had become too low because of inflation, or were too high or too low for particular categories of offenses.

Subsection (r) requires the Sentencing Commission to give "due consideration" to a request by a defendant for modification of the sentencing guidelines applied to his case. The defendant could request such modification only on the basis of changed circumstances that were unrelated to his individual case, such as changes in the community view of the gravity of the offense, or the deterrent effect particular sentences for the offense might have on the commission of the offense by others. The Commission is required to respond, to state reasons for any declination to make modifications, and to keep the Congress informed of such actions on an annual basis. The Committee included this provision in the Ninety-Sixth Congress in order to assure that the Commission is constantly alerted to the possible need for amendments to the guidelines. Of course, if the Commission accepts a defendant's recomendations for amendment, it would submit the proposed amendment, and a report of the reasons for it, to the Congress pursuant to subsection (o), and would be expected to make a copy of these materials available to the defendant.

Subsection (s) requires the Commission to describe the "extraordinary and compelling reasons" that would justify a reduction of a particularly long sentence imposed pursuant to proposed 18 U.S.C. 3582 (c)(1)(A). The subsection specifically states, consistent with the rejection by the Committee of the rehabilitation theory as the basis for determining the length of a term of imprisonment, that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for reducing the sentence.

Subsection (t) requires the Sentencing Commission, in reducing the recommended term of imprisonment for a particular category of offense, to specify by what amount, if any, the term of a prisoner serving a sentence outside the new guidelines range may be reduced. This specification would then be used by the court in assessing a prisoner's petition pursuant to proposed 18 U.S.C. 3582(c)(3). It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases. However, if there is a major downward adjustment in guidelines because of a change in the community view of the offense, the Commission may conclude that this adjustment should apply to persons already serving sentences.

Subsection (u) provides that the policy statements issued by the Sentencing Commission shall include a policy limiting consecutive terms for an offense involving violation of a general prohibition and an offense involving a specific prohibition contained within the general prohibition. The policy is intended to apply to those offenses which in effect are "lesser included offenses" in relation to other, more serious ones, but which for merely technical reasons do not quite come within the definition of a lesser included offense. The limitation need not be a complete prohibition (except when sentencing for both offenses would be barred by law); its extent is to be determined by the Commission.

Subsection (v) provides that the appropriate judge or officer [418] will supply the Sentencing Commission in each case with a written report of the sentence containing detailed information as to the various factors relevant to the sentence and other information found appropriate by the Commission.[419] This provision is necessary for the Sentencing Commission to be able to monitor the effectiveness of various sentencing policies and practices. The Commission is required to submit at least annually to the Congress an analysis of the reports submitted to it under this provision, together with any recommendations for legislation that the analysis indicates is warranted.

Subsection (w) makes the provisions of 5 U.S.C. 553, the provisions of the Administrative Procedure Act that relate to rulemaking, applicable to the promulgation of guidelines pursuant to section 994. This is an exception to the general inapplicability of the Administrative Procedure Act—including its requirement of publication in the Federal Register—to the judicial branch.[420]

This provision establishes minimum procedural requirements for outside consultation by the Commission. The Committee recognizes that, ordinarily, the Commission will observe more extensive procedures than those required by section 553, at an earlier stage in the process of guideline development, to acquaint itself fully on the issues involved in the promulgation of specific guidelines. Proposed 28 U.S.C. 995(a)(21) empowers the Commission to hold hearings and call witnesses in the fulfillment of its duties. Such procedures are particularly appropriate for use by the Commission in developing guidelines. The Commission should consider as broad a cross-section of views and consult as diverse a group of interested parties as possible during all stages of guideline development. In this context the notice-and-comment procedures of section 553 will serve as a checking mechanism to insure that all relevant views are evaluated by the Commission. As a result, the Committee does not intend that the informal rulemaking procedures of section 553 constitute the first and only means by which the Commission consults interested parties outside the Commission; rather, these procedures represent the final steps in the process. It is also not intended that the guidelines be subject to appellate review under chapter 7 of title 5. There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.

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[418] E.g., magistrate, probation officer, or prison officials.

[419] See also proposed 28 U.S.C. 995(a)(8).

[420] See 5 U.S.C. 551.

SECTION 995. POWERS OF THE COMMISSION

Subsection (a) enumerates twenty-one specific powers of the Commission that may be exercised by majority vote of the members present and voting,[421] and provides, in paragraph (22) that the Commission may perform such other functions as are required to permit Federal courts to meet their sentencing responsibilities, as provided in section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities. The section reflects the broad responsibility imposed upon the Commission to assure that sentencing and the administration of sentences fulfill the purposes of sentencing enumerated in section 3553(a) of title 18.

The first eight paragraphs of subsection (a) contain general administrative powers necessary to carry out the functions of the Commission. Paragraph (1) provides that the Commission may establish general policies and promulgate necessary rules and regulations. The policies, rules, and regulations covered by this paragraph differ from the sentencing guidelines and policy statements required to be promulgated pursuant to section 994(a)—paragraph (1) relates to those provisions necessary for the internal administration of the Commission and such matters as establishing the procedures for the conduct of hearings and receipt of views on the guidelines and policy statements. Paragraph (2) provides that the Commission may appoint and fix the salary and duties of the Staff Director of the Commission, who will be paid at a rate not to exceed the highest rate applicable for grade 18 of the General Schedule. It is the intent of the Committee that the Staff Director be a highly qualified individual who is able efficiently to administer the staff of the Commission, including administration of its very important research functions. Paragraph (3) gives the full Commission the authority to deny, revise, or ratify budget requests of the Commission prepared under the direction of the Chairman of the Commission pursuant to section 993(b)(1). Paragraphs (4), (5), (6), and (7) contain provisions common to Federal commissions relating to procurement power, acquisition of property and services, and contract authority. Paragraph (8) permits the Commission to request information from Federal agencies and judicial officers required in the performance of its duties, and permits those agencies and officers to provide the requested information consistent with other provisions of law. This provision is designed to permit the Commission to obtain information necessary to its research concerning efficacy of sentencing practices and to the preparation of guidelines and policy statements relating to sentencing matters.

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[421] It is intended that the members of the Commission approve the broad outlines of various research-related projects and provide policy guidance to their conduct. The functions of the Commission set forth here could, of course, be delegated to a committee or staff personnel by vote of the Commission in those instances where the day-to-day details would be too cumbersome to manage by full Commission action. See subsection (b). This is in contrast to the promulgation of guidelines and policy statements pursuant to section 994, matters which cannot be delegated. See proposed 28 U.S.C. 995(b).

In addition to these general administrative provisions, section 995 gives the Commission a number of powers relating specifically to its role in monitoring the effectiveness of the sentencing practices and policies in the Federal criminal justice system.

Under subsection (a)(9), the Sentencing Commission has authority to monitor the performance of probation officers with respect to sentencing recommendations, including those relating to application of guidelines and policy statements. Under subsection (a)(10), the Commission is authorized to issue instructions to probation officers concerning the application of guidelines and policy statements of the Commission. Under proposed 28 U.S.C. 994(b), these functions are to be coordinated, to the extent practicable, with the related activities of the Administrative Office of the United States Courts and the Federal Judicial Center. The probation officers will be a crucial link in the effectiveness of both sentencing guidelines and policy statements. It is essential that in preparing presentence reports, as well as making recommendations concerning applicable guidelines and in notifying sentencing judges of pertinent policy statements of the Sentencing Commission, the probation officers have sufficient information from the Commission to be able to discharge these duties with reasonable consistency. In addition, the probation officers, as supervisors of probationers and persons on supervised release, will need an understanding of the guidelines and policy statements in order to assist them in carrying out those supervisory functions.

A number of additional provisions provide for extensive research and data collection and dissemination authority in the sentencing area.[422] These functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in proposed 18 U.S.C. 3553(a)(2),[423] and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.[424] These functions are to be carried out in cooperation, to the extent practicable, with the Administrative Office of the United States Courts and the Federal Judicial Center.[425]

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[422] Subsections (a)(12) through (a)(16).

[423] See proposed 28 U.S.C. 991(b)(2).

[424] See proposed 28 U.S.C. 991(b)(1)(C). See also proposed 28 U.S.C. 994(n).

Under subsection (a)(17), the Sentencing Commission is authorized to conduct programs of instruction in sentencing techniques for persons connected with the sentencing process.[426] While the instructional effort would probably be most extensive during the early period of implementing the initial guidelines and policy statements, it is expected that periodic instruction will continue to be necessary, partly to bring personnel up to date on changes in the guidelines and policy statements and on developments in the case law, and partly to instruct new personnel in the Federal criminal justice system. The programs could be run in cooperation with the Department of Justice if both believed this approach would be helpful.[427] The programs are expected to be run in cooperation, to the extent practicable, with the Administrative Office of the United States Courts and the Federal Judicial Center.[428]

Under subsection (a)(19), the Commisson is authorized to study the feasibility of developing guidelines for the disposition of juvenile delinquents. The Parole Commission now uses its Youth Corrections Act guidelines for juveniles; it is expected that the Sentencing Commission will make a similar recommendation for Federal judges.

Subsection (b) is a broad statement as to powers and duties similar to section 995(a)(22), and includes specific authority to delegate powers other than promulgation of general policy statements and guidelines for sentencing pursuant to section 994(a), the issuance of general policies and promulgation of rules and regulations pursuant to section 995(a)(1), and the decision as to the factors to be considered in establishment of categories of offenders and offenses pursuant to section 994(b). It also contains language that requires the Commission, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, to utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center in order to avoid unnecessary duplication.[429]

Subsection (c) requires Federal agencies to make services, equipment, personnel, facilities, and information available to the greatest practicable extent upon request of the Commission in the execution of its functions.

Subsection (d) provides that a simple majority of the membership then serving shall constitute a quorum for the conduct of business. Except for the promulgation of sentencing guidelines or policy statements, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

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[425] See proposed 28 U.S.C. 995(b).

[426] The Sentencing Commission may wish to include in these programs such persons as prosecutors and defense counsel, sentencing and appellate judges, and probation officers who need to understand the Commission's guidelines and policy statements in order to assure their understanding of the new sentencing policies and procedures. In addition, prison officials would benefit from such instruction if they are involved in making sentencing recommendations and carrying out sentences pursuant to the guidelines and policy statements.

[427] See subsections (a)(11) and (b).

[428] See proposed 28 U.S.C. 995(b).

[429] Criminal Code Hearings, Part XVI, at 11918 (testimony of Judge Gerald Tjoflat).

Section 994(a) requires that guidelines and policy statements be promulgated only by affirmative vote of at least four members of the Commission. The phrase in subsection (d), "the membership then serving", means those members who have been appointed by the President and confirmed by the Senate. For example, if only five have been appointed at a given time, then only three are needed for a quorum, and the Commission may conduct most routine business by the vote of two.

Subsection (e) requires the Commission, except where otherwise provided by law, to make available for public inspection a record of the final vote of each member on any actions taken.

SECTION 996. DIRECTOR AND STAFF

The Staff Director is given authority, under subsection (a), to supervise the activities of the Commission employees and perform other duties assigned by the Commission, and, under subsection (b), to appoint such officers or employees as are necessary in the execution of the functions of the Commission, subject to the approval of the Commission. The Committee intends that the Commission staff consist of persons with a wide variety of backgrounds pertinent to conducting criminal justice research and making recommendations as to sentencing policy.

The officers and employees of the Commission are, under subsection (b), exempted from most Civil Service provisions in title 5, United States Code, except for the benefits provided in chapters 81–89.

SECTION 997. ANNUAL REPORT

This section requires the Commission to report annually to the Judicial Conference, the Congress, and the President on the activities of the Commission.

SECTION 998. DEFINITIONS

This section defines the terms "Commission," "Commissioner," "guidelines," and "rules and regulations."

REPEALERS

Section 208(a) of the bill repeals a number of provisions of title 18 of the United States Code.

Section 1 of title 18, which defines felonies, misdemeanors, and petty offenses, is deleted as covered in the sentencing provisions of proposed chapter 227 of title 18.

Section 3012, relating to orders respecting persons in custody, is repealed as replaced by this title.

Sections 4082(a), 4082(b), 4082(c), 4082(e), 4084, and 4085, relating to commitment and transfer, are repealed as replaced by this title.

Chapter 309, relating to good time allowances and release dates, is repealed as covered by the release provisions of proposed 18 U.S.C. 3624.

Chapter 311, relating to parole, is repealed as replaced by the new sentencing provisions.

Chapter 314, relating to sentencing of narcotic addicts, is repealed consistent with the decision to repeal specialized sentencing provisions and replace them with provisions for sentencing guidelines that permit consideration of all combinations of offense and offender characteristics in a systematic manner.

Sections 4281, 4283, and 4284, relating to discharge and release payments, are deleted as covered by provisions of proposed chapter 229 of title 18.

Chapter 402, the Federal Youth Corrections Act, is repealed as covered by the sentencing guidelines provisions, particularly proposed 28 U.S.C. 994(d)(1). See the discussion of that provision.

Sections 208 (b) through (e) contain technical amendments to various analyses contained in title 18 to reflect the repeal of certain sections and chapters.

Section 209(a) repeals sections 404(b) and 409 of the Controlled Substances Act (21 U.S.C. 844(b) and 849), the specialized sentencing provisions for special dangerous drug offenders. These special dangerous offender provisions are more adequately covered in the sentencing guidelines provisions that require the guidelines to reflect a substantial term of imprisonment for drug traffickers. Section 209(b) makes a technical correction.

TECHNICAL AND CONFORMING AMENDMENTS

Section 210(a) amends section 212(a)(9) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(9)) to reflect the deletion of the concept of petty offense.

Section 210(b) amends section 242(h) of the Immigration and Nationality Act (8 U.S.C. 1252(h)) to add a reference to a term of supervised release after a reference to a parole term.

Section 211 amends section 4 of the Act of September 28, 1962 (16 U.S.C. 460k-3) to replace a reference to petty offenses with a reference to misdemeanors.

Section 212 amends section 9 of the act of October 8, 1944, to reflect the authority of the United States Magistrate to try and sentence persons charged with the commission of misdemeanors and infractions, as defined in proposed 18 U.S.C. 3581.

Section 213(a) amends section 924(a) of title 18 to delete a reference to parole, since parole is abolished.

Section 213(b) amends section 1161 of title 18 to update a cross-reference.

Section 213(c) amends section 1761(a) of title 18 to make an exception to the restriction on transportation or importation of prison-made goods applicable to a person on supervised release as well as to one on parole.

Section 213(d) amends section 1963 of title 18 to conform to changes in the forfeiture statutes made by this title.

Section 213(e) amends section 2114 of title 18 to make clear that it is not intended that the sentence in that section is mandatory.

Section 213(f) amends section 3006A of title 18 to reflect the new grading scheme in the sentencing provisions and to delete reference to revocation of parole, since parole is abolished by this title.

Section 213(g) amends the new bail release pending sentence or appeal provisions in title I of this Act to except from detention defendants for whom the guideline does not recommend a term of imprisonment (new 18 U.S.C. 3143(a)) and to make provision for detention or release pending government appeal of a sentence under section 3742 of the new sentencing provisions of title 18.

Section 213(h) amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense while on release (new 18 U.S.C. 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines.

Section 213(i), (j), and (k)(2) amend sections 3156(b)(2), 3172(2), and 3401(h) of title 18 to reflect the new grading scheme set forth in section 3581 of title 18.

Subsection (k) also amends section 3401 by repealing subsection (g), which relates to magistrate sentencing in youth offender cases, since the youth offender provisions in current law have been repealed.

Section 213(l)(2) of the bill amends cross-references in section 3670 (formerly section 3619) of title 18.

Section 213(m) of the bill deletes a reference to parole officers in section 4004.

Section 213(n) of the bill amends chapter 306 of title 18, relating to transfer of offenders to and from foreign countries, in several respects. First, it amends subsection (f) of section 4101 to include a term of supervised release in the definition of parole. Second, it amends subsection (g) of section 4101 to conform the description of probation to the provisions of proposed subchapter B of chapter 227 of title 18. Third, it amends section 4105(c) to bring a reference in paragraph (1) into conformity with the revised provisions relating to credit toward service of sentence for satisfactory behavior contained in proposed 18 U.S.C. 3624, to conform cross-references in paragraphs (1) and (2), to delete paragraph (3) because of the new provisions relating to good time set forth in proposed 18 U.S.C. 3624, and to amend paragraph (4) to delete references to forfeiture of good time as inconsistent with the provisions of proposed 18 U.S.C. 3624. Section 4106 is amended to place offenders who are on parole in a foreign country who are transferred to the United States under supervision by the probation system rather than the Parole Commission, which would be abolished by this bill, and to provide that an offender transferred to serve a term of imprisonment shall be released in accord with the provisions of proposed 18 U.S.C. 3624(a) after serving the period of time specified in the applicable sentencing guidelines (rather than the Parole Commission's setting the release date). If the guidelines recommend a term of supervised release for such an offender, the offender will be placed on such a term. The provisions of proposed 18 U.S.C. 3742 are made applicable to determination of a release date under the subsection, and the United States court of appeals for the district in which the offender is imprisoned or under supervision after transfer to the United States has jurisdiction to review the release date as though it had been set by the district court. Section 4106(c) is repealed, since it relates to parole release and parole has been abolished. Section 4108(a) is amended to require that, when an offender's consent to transfer to the United States is verified, the offender be informed of the applicable guideline sentence for his offense.

Section 213(o) of the bill amends section 4321 of title 18 to delete a reference to parole.

Section 213(p) of the bill amends section 4351(b) of title 18 to make the Chairman of the Sentencing Commission a member of the National Institute of Corrections Advisory Board in place of the Chairman of the Parole Commission.

Section 213(q) of the bill amends section 5002 of title 18 to make the Chairman of the Sentencing Commission a member of the Advisory Corrections Council, and to delete references to the Parole Commission.

Section 214 of the bill amends section 401(b)(1)(A), (b)(1)(B), (b)(2), (b)(5), and (c) and section 405 of the Controlled Substances Act to delete references to a special parole term for various drug trafficking offenses. Section 401(b)(4) is amended to conform to the fact that the special sentencing provisions for drug possession have been moved to proposed 18 U.S.C. 3607. Section 408(c) is amended to delete a reference to the current parole statutes.

Section 215 of the bill deletes references in the Controlled Substances Import and Export Act to special parole terms.

Section 216 of the bill amends section 114(b) of title 23, United States Code, to add a reference to a term of supervised release.

Section 217 of the bill amends section 5871 of the Internal Revenue Code of 1954 to delete a reference to eligibility for parole.

Section 218(a) of the bill amends section 509 of title 28 to delete a reference to the Parole Commission. Section 218(b) of the bill amends section 591 of title 28 to conform to the grading of misdemeanors and infractions.

Section 218(c) of the bill amends section 2901 of title 28 to add a reference to a term of supervised release and to conform a cross-reference to proposed chapter 227 of title 18.

Section 219 of the bill amends section 504(a) of the Labor Management Reporting and Disclosure Act of 1959, which forbids, with certain exceptions, a current or former member of the Communist Party or a person convicted of one of a list of specific offenses from holding office in a labor organization, to specify that the sentencing judge, rather than the Parole Commission, should decide whether a person convicted of a Federal offense can hold union office. If the offense is a State or local offense, a judge of the United States district court in which the offense was committed may, under the amendment, make the decision upon motion of the Department of Justice. Section 504(a) of the Labor Management Reporting and Disclosure Act of 1959 is also amended to specify that decisions under the section are to be made pursuant to sentencing guidelines and policy statements promulgated pursuant to proposed 28 U.S.C. 994(a). Section 504(a) is further amended by deleting a reference to administrative proceedings before the Board of Parole so as to conform with changes made in a reference to the sentencing court. Similar amendments are made by section 219 of the bill to section 411(a) of the Employee Retirement Income Security Act of 1974. In addition, section 411(c)(3) of the Employee Retirement Income Security Act of 1974 is amended by section 220 of the bill, to add a reference to a term of supervised release after a reference to parole.

Section 221 amends section 454(b) of the Comprehensive Employment and Training Act of 1973 to add a reference to a term of supervised release after a reference to parole.

Section 222(a) amends section 341(a) of the Public Health Service Act to delete references to hospitalization of drug addicts convicted of an offense and sentenced under the Narcotic Addict Rehabilitation Act of 1966 or the Federal Youth Corrections Act. Both those provisions are repealed by this bill in favor of permitting sentencing guidelines to recommend appropriate sentences for all combinations of offense and offender characteristics.

Section 343(d) of the Public Health Service Act is also amended by section 222 to add a reference to a term of supervised release after the reference to parole.

Section 223 of the bill amends section 11507 of title 49, United States Code, to add a reference to a term of supervised release after the reference to parole.

Section 224 amends section 10(b)(7) of the Military Selective Service Act (50 U.S.C. App. 460(b)(7)) to substitute a reference to "release" for a reference to "parole."

SECTION 225. EFFECTIVE DATE

Subsection (a) of section 225 contains the effective date provision for this title. It provides that, with three exceptions, this title will take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment.

The first exception, contained in subsection (a)(1)(A), is that the repeal of the Federal Youth Corrections Act, chapter 402 of title 18, will take effect immediately.

The second exception, contained in subsection (a)(1)(B)(i), is that the provisions of chapter 58 of title 28, United States Code, relating to the creation and responsibilities of the United States Sentencing Commission, will take effect on the date of enactment. Paragraph (B) also specifies that the Sentencing Commission shall submit the initial sentencing guidelines promulgated pursuant to 28 U.S.C. 994(a)(1) to the Congress within 18 months of the date of enactment. Under subsection (a)(2), the terms of the first members of the United States Sentencing Commission will not begin to run for purposes of proposed 28 U.S.C. 992(a) until the sentencing guidelines are in effect pursuant to subsection (a)(1)(B)(ii) even though they will be appointed well before that time. The work of the Sentencing Commission in promulgating sentencing guidelines and policy statements is crucial to the effectiveness of the revised sentencing system set forth in the bill. It is essential that the work of the Sentencing Commission begin as soon after the date of enactment of this Act as possible.

The third exception, contained in subsection (a)(1)(B)(ii) is that the sentencing guidelines system will not replace the current law provisions relating to the imposition of sentence, the determination of a prison release date, and the calculation of good time allowances, until three events occur: First, the Sentencing Commission must have submitted the initial set of sentencing guidelines to the Congress along with a report of the reasons for its recommendations. Under subsection (a)(1)(B)(i), the Commission has 150 days from the date of enactment to make that submission. Second, the General Accounting Office must, within three months of the submission of the guidelines, conduct a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and report its findings to the Congress. Third, the Congress must have six months after the guidelines have been submitted to it, during which the General Accounting Office has made its report pursuant to subsection (a)(1)(B)(ii), in which to examine the guidelines and consider the reports. This provision assures that there is ample opportunity for interested parties to examine the proposed initial guidelines before they are used to replace the existing sentencing system.

The title will apply to any offense or other event occurring on or after the effective date. A sentence imposed before the effective date of the guidelines as to an individual imprisoned or on probation or parole on that date would not be affected by this title. As to an offense committed prior to the effective date, the preexisting law will apply as to all substantive matters including the imposable sentence. If a trial occurs or a sentence is imposed on or after the effective date for an offense committed before the effective date, the procedural and administrative provisions of the title will apply except to the extent that such provisions are inconsistent with the preexisting law.

Subsection (b) retains the Parole Commission and current law provisions related to parole in effect for the five-year period after the effective date of this title in order to deal with sentences imposed under current sentencing practices. It also keeps the provisions as to a term of imprisonment in current law in effect during the period described in subsection (a)(1)(B). This will assure that the length of a term of imprisonment, and the parole and good time statutes, will remain in effect as to any prisoner sentenced before the sentencing guidelines and the provisions of proposed 18 U.S.C. 3553 and 3624 go into effect pursuant to subsection (a)(1)(B). All other aspects of the sentencing provisions will go into effect on the effective date of the title as to any person sentenced after the effective date.

Most of those individuals incarcerated under the old system will be released during the five-year period. As to those individuals who have not been released at that time, the Parole Commission must set a release date for them prior to the expiration of the five years that is consistent with the applicable parole guidelines.[430]

Subsection (b) also assures that, while the Parole Commission remains in existence, the Chairman of the Parole Commission or his designee will remain a member of the National Institute of Corrections, and that the Chairman will remain a member of the Advisory Corrections Council ex officio and be an ex officio member of the United States Sentencing Commission.

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[430] The Committee intends that, in the final setting of release dates under this provision, the Parole Commission give the prisoner the benefit of the applicable new sentencing guideline if it is lower than the minimum parole guideline.

SECTION 226. REVIEW BY CONGRESS

Section 226 of the bill requires the General Accounting Office to conduct a six-month study, four years after the effective date of the sentencing guidelines, of the operation of those guidelines compared with the current parole release system. The United States Sentencing Commission will be required to provide the GAO, all appropriate courts, the Department of Justice, and the Congress with a report detailing the operation of the sentencing guidelines and making recommendations. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration. The report is to be issued by affirmative vote of a majority of the voting members of the Commission. These requirements are derived from language in 28 U.S.C. 994(p) of the original bill, and the amendments of the 98th Congress simply combined all the reporting requirements.

Congress will be required to review the GAO study, along with the Sentencing Commission report, to determine the effectiveness of the sentencing guidelines system, whether any changes are needed in the system and whether the parole system should be reinstated in some form.

TITLE III—FORFEITURE

GENERAL STATEMENT AND SUMMARY

1. In General

Title III of the bill (Sections 301-323) is designed to enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking. Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows. More than ten years ago, the Congress recognized in its enactment of statutes specifically addressing organized crime and illegal drugs [1] that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power.

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

In April 1981 the General Accounting Office released a report entitled *Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking*. The report concluded that since enactment in 1970 of the Racketeer Influenced and Corrupt Organizations Statute (RICO) and the Comprehensive Drug Prevention and Controll Act—the first Federal statutes to contain criminal forfeiture provisions—the Federal Government's record in taking the profit out of organized crime, especially drug trafficking, was far below Congress' expectations. The GAO concluded that the major reasons for the failure of forfeiture statutes—which in 1970 were proclaimed to be the ideal weapon for breaking the backs of sophisticated narcotics operations—were (1) that Federal law enforcement agencies had not aggressively pursued forfeiture, and (2) that the current forfeiture statutes contain numerous limitations and ambiguities that have significantly impeded the full realization of forfeiture's potential as a powerful law enforcement weapon. In recent years the Justice Department and other Federal agencies have a concerted effort to increase the use of forfeiture in narcotics and racketeering cases. This bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies.

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[1] 18 U.S.C. 1961 *et seq.* and 21 U.S.C. 848.

Improvement of forfeiture laws is of bipartisan concern. During his tenure as Chairman of the Subcommittee on Criminal Justice in the 96th Congress, Senator Biden held hearings on forfeiture of narcotics proceeds[2] and introduced strong forfeiture legislation in the 96th Congress.[3] Also in the 97th Congress, Senator Thurmond, at the request of the Administration, introduced S. 2320, a comprehensive forfeiture bill. Hearings on this bill were held on April 23, 1982.[4] S. 2320 was favorably reported by the Committee on August 10, 1982.[5] Similar provisions were also included as title VII in S. 2572, an omnibus crime bill introduced on May 26, 1982, and placed directly on the Senate Calendar. With additional amendments to the forfeiture title, S. 2572 passed the Senate on September 30, 1982, by a vote of 95 to 1.[6] The text of S. 2572, as passed, was added to a House-passed bill, H.R. 3963, by voice vote.[7] A compromise forfeiture title was included in H.R. 3963 as it passed the House on December 20, 1982, by a vote of 271–27 and as adopted by the Senate on the same date by voice vote.[8] The President pocket vetoed H.R. 3963 for reasons unrelated to the forfeiture provisions.

In this Congress, forfeiture provisions similar to those that passed the Senate last Congress were introduced by Senator Thurmond on March 16, 1983, as a part of the Administration's "Comprehensive Crime Control Act of 1983" (S. 829), by Senator Biden in the "National Security and Violent Crime Control Act of 1983" (S. 830), and by Senator Biden in a separate bill on future bill on forfeiture (S. 948). Comment on this subject was received in the hearings on S. 829 and related bills.[9]

In large measure, the forfeiture improvements in title III of this bill are the same as those contained in S. 829 and S. 948.

For the most part, title III's forfeiture amendments do not focus on significant expansion of the scope of property subject to forfeiture. (Authority to civilly forfeit real property used in drug trafficking and clarification of the forfeitability of proceeds of racketeering is provided, however.) Instead, they focus primarily on improving the procedures applicable in forfeiture cases. The more significant of these amendments includes measures to prevent pre-conviction transfers of assets in criminal forfeiture cases, allows forfeiture of substitute assets where transfer or concealment of assets does occur, allows the use of criminal forfeiture as an alternative to civil forfeiture in all drug felony cases, clarifies the authority for staying civil forfeiture proceedings where a related criminal case is underway, provides a funding mechanism to allow use of forfeiture proceeds to defray the escalating costs to the government in pursuing forfeitures, and increases the availability of efficient administrative procedures in uncontested civil forfeiture cases.

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[2] *Forfeiture of Narcotics Proceeds*, Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, United States Senate, 96th Cong., 2d (1980).

[3] See, e.g., S. 1126, 97th Cong., 1st Sess. (1981).

[4] *DEA Oversight and Budget Authorization*, Hearings before the Subcommittee on Security and Terrorism of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982).

[5] S. Rept. No. 97–520, 97th Cong., 2d Sess. (1982).

[6] 128 Cong. Rec. S 12793–S 12794, S 12839–S 12840, S 12859 (daily ed.).

[7] *Id.* at S12859. In the meantime, a companion forfeiture bill to S. 2320 with significant differences, H.R. 7140, was reported by the House Committee on the Judiciary (H. Rept. No. 97–883, 97th Cong., 1st Sess. (1982)) and passed the House on September 28, 1982 (128 Cong. Rec. H 7664–H 7670 (daily ed.)).

On October 1, 1982, the Senate called up H.R. 7140, substituted the text of title VII of S. 2572 with technical amendments, and passed it by voice vote (*id.* at S 13161–S 13165).

[8] *Id.* at H 10509, S 15853.

[9] See, e.g., Crime Control Act Hearings (statement of the Department of Justice, pp. 46–53; statement of National Association of Attorneys General, pp. 5–6; statement of the National District Attorneys Association, pp. 25–26).

2. Present Federal Law

There are presently two types of forfeiture statutes in Federal law. The first, civil forfeiture of crime-related property through an *in rem* proceeding, has long been a part of Federal statutory law. A variety of assets used in drug violations, such as boats, cars, and manufacturing equipment, may be civilly forfeited under 21 U.S.C. 881. Since 1978, this statute has also provided for the civil forfeiture of the proceeds of illicit drug transactions. In addition, assets used in drug smuggling operations may be civilly forfeited under the customs laws.[10]

A civil forfeiture is commenced by the government's seizure of the asset.[11] If the value of the asset exceeds $10,000 a judicial forfeiture is always required. For assets of lesser value, if no party comes forward to contest the forfeiture and file the bond required for a judicial proceeding—presently $250—the property may be forfeited in an administrative proceeding. Since civil forfeiture is an *in rem* proceeding, the forfeiture case must be brought in the judicial district in which the property is located. The property is the defendant in the case, but parties with an interest in the property may contest the forfeiture.[12] The "preponderance of the evidence" standard of proof applies in civil forfeitures as in other civil actions. A party who does not have legal basis for defeating the forfeiture, but who has an equitable basis for relief, may petition the Attorney General for remission or mitigation of the forfeiture.

The other type of forfeiture, criminal forfeiture, is relatively new to Federal law, although it has its origins in ancient English common law. It is an *in personam* proceeding against a defendant in a criminal case and is imposed as a sanction against the defendant upon his conviction. Congress first acted to provide for criminal forfeiture when it passed the Racketeer Influenced and Corrupt Organizations statute [13] and the Continuing Criminal Enterprise (CCE) statute.[14] These statutes address, respectively, the conduct, acquisition, and control of enterprises through patterns of racketeering activity, and the operation of groups involved in patterns of serious drug offenses.

Criminal forfeiture must be alleged in the information or indictment. If the defendant is found guilty of the underlying offense, then a special verdict must be returned with respect to the forfeiture allegations and a judgment of forfeiture is entered against the defendant.[15] Only then is the government authorized to seize the property. Prior to conviction the court may enter a restraining order or require a performance bond to guard against improper disposition of forfeitable assets. This authority arises, however, only after the filing of an indictment or information. No mechanism exists in current law to protect against improper transfers or concealment of assets at an earlier stage. Moreover, no standard for issuance of restraining orders is articulated in current statutes. Should a defendant succeed in transferring or concealing his forfeitable assets prior to conviction, there is no procedure to allow forfeiture of other assets of the defendant to satisfy the forfeiture judgment.

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[10] 19 U.S.C. 1595a.

[11] The procedures for forfeitures under the Tariff Act of 1930 (19 U.S.C. 1202 *et seq.*) apply to civil forfeitures of drug-related assets. See 21 U.S.C. 881(d).

[12] Generally, the guilt or innocence of the owner of the asset is irrelevant. However, some more recently enacted forfeiture statutes specifically provide that property of an innocent owner may not be forfeited. See, e.g., 21 U.S.C. 881(a)(6).

[13] 18 U.S.C. 1961 et seq. (hereinafter cited as RICO).

[14] 21 U.S.C. 848.

Once an asset is civilly or criminally forfeited, the government normally must sell it.[16] The proceeds of the sale must be used to offset the government's expenses. Should these expenses exceed the amount realized in the sale, the loss must be borne by the agency's budget. If the sale proves profitable from the government's standpoint, the amounts realized must be deposited in the general fund of the Treasury. Proceeds from profitable sales may not be used to offset losses in unprofitable sales. Losses in forfeitures are often the result of delays that occur before judicial proceedings may be held to resolve civil forfeitures. During these periods of delay, expenses to the government mount and the value of the property depreciates.

It was hoped that through the use of current criminal and civil forfeiture provisions, forfeiture would become a powerful weapon in the fight against drug trafficking and racketeering. But the record of obtaining significant forfeitures in narcotics and organized crimes cases, particularly in contrast with the burgeoning illicit drug trade, is viewed with some disappointment.[17] To be sure, Federal law enforcement agencies have, in recent years, placed an increased emphasis on forfeitures and progress has been made. For example, seizures of assets in drug cases now run into the millions of dollars. However, in light of the fact that the profits produced by drug trafficking are estimated to be in the billions, if not the tens of billions of dollars annually, it is clear that the full law enforcement potential of forfeiture is not being realized. Serious impediments to reaching this goal are the limitations and ambiguities of current forfeiture statutes. While there are a variety of problems posed by present forfeiture statutes, the most significant arise in the areas discussed below.

First, the scope of property subject to forfeiture is, in two important respects, too limited. The RICO statute, which was designed to deprive racketeers of the economic power generated by and used to sustain organized criminal activity has been interpreted by several courts so as to prevent the criminal forfeiture of a defendant's ill-gotten profits, even though other of his interests used or acquired in violation of the RICO statute would be forfeitable.[18] The result of exempting racketeering proceeds from RICO's criminal forfeiture scheme has been to seriously undercut the statute's utility and significantly limit the extent of RICO forfeitures, particularly in cases involving wholly criminal enterprises where there may be little other than profits in the way of forfeitable assets.

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[15] Rules 31(e) and 32(b)(2) of the Federal Rules of Criminal Procedure.

[16] Forfeited property may also be retained for official use. See e.g., 21 U.S.C. 881(e)(1).

[17] See, e.g., Forfeiture of Narcotics Proceeds Hearing, *supra* note 2.

[18] See *e.g.*, *United States* v. *McManigal*, 708 F.2d 276 (7th Cir. 1983) and *United States* v. *Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980).

The extent of drug-related property subject to civil forfeiture under 21 U.S.C. 881 is also too limited in one respect. Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marihuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.[19]

A second serious problem in achieving the forfeiture of significant assets in racketeering and drug cases is that the criminal forfeiture provisions of the RICO and CCE statutes fail adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction. Unlike civil forfeitures, in which the government's seizure of the asset occurs at or soon after the commencement of the forfeiture action, in criminal forfeitures, the assets generally remain in the custody of the defendant until the time of his conviction for the offense upon which the forfeiture is based. Only after conviction does the government seize the asset. Thus, a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture.

Currently, the only mechanism available to the government to prevent such actions is the authority to obtain a restraining order and this statutory authority is limited to the post-indictment period. Thus, even if the government is aware that a person is disposing of his property in anticipation of the filing of criminal charges against him, it has no specific authority under the RICO or CCE statutes to obtain an appropriate protective order. Furthermore, even if the government is able to obtain a restraining order, should the defendant choose to defy it, he can effectively prevent the forfeiture of his property and face only the possibility of contempt sanctions for his defiance of the court's order. The important economic impact of imposing the sanction of forfeiture against the defendant is thus lost.

Although current law does authorize the issuance of restraining orders in the post-indictment period, neither the RICO nor CCE statute articulates any standard for the issuance of these orders. Certain recent court decisions have required the government to meet essentially the same stringent standard that applies to the issuance of temporary restraining orders in the context of civil litigation and have also held the Federal Rules of Evidence to apply to hearings concerning restraining orders in criminal forfeiture cases.[20] In effect, such decisions allow the courts to entertain challenges to the validity of the indictment, and require the government to prove the merits of the underlying criminal case and forfeiture counts and put on its witnesses well in advance of trial in order to obtain an order restraining the defendant's transfer of property alleged to be forfeitable in the indictment. Meeting such requirements can make obtaining a restraining order—the sole means available to the government to assure the availability of assets after conviction—quite difficult. In addition, these requirements may make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victims in racketeering and narcotics trafficking cases who would be required to testify at the restraining order hearing.

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[19] Real property is subject to criminal forfeiture under the RICO and CCE statutes. Also, real property which constitutes or is traceable to the proceeds of an illegal drug transaction is civilly forfeitable under 21 U.S.C. 881(a)(6).

The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. In civil forfeitures, such transfers are voidable, for the property is considered "tainted" from the time of its prohibited use or acquisition. But it is unclear whether, in the context of criminal forfeitures, the same principle is applicable so that improper pre-conviction transfers may be voided.

In sum, present criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of his assets. Changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture.

A third major problem with current forfeiture statutes arises from the need to pursue virtually all forfeitures of drug-related property through civil proceedings. Until recently, civil forfeiture proceedings under title 21 were not perceived as particularly problematic. Indeed, in certain respects, civil forfeiture has advantages over criminal forfeiture. As noted above, property is generally seized early on in a civil forfeiture case, thus limiting the problem of transfers and concealment of assets. Also the government's burden of proof is lower in these cases. However, as drug trafficking has increased and the government has stepped up its enforcement and forfeiture efforts, the backlog of civil forfeiture cases in some parts of the country has become unmanageable. A way of relieving this problem would be to allow Federal prosecutors, in appropriate circumstances, to pursue criminal, rather than civil, forfeitures in drug cases. The problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in addition to the criminal case, to file a separate civil suit. And where the property of a defendant, or defendants, in the criminal case is located in more than one judicial district, a separate civil forfeiture suit must be filed in each of these districts.

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[20] See, *e.g., United States* v. *Crozier,* 674 F.2d 1293 (9th Cir. 1982), *petition for cert. filed,* No. 82-819 (Nov. 15, 1982).

A more efficient method of obtaining the forfeiture of assets of drug defendants would be to permit prosecutors the option of pursuing a criminal forfeiture in which the forfeiture action can be consolidated with the prosecution of the offense giving rise to forfeiture. In cases where this alternative could be pursued, valuable judicial and law enforcement resources could be saved.

A fourth significant problem is the financial burden aggressive pursuit of forfeiture cases places on our law enforcement agencies. As noted above, where the sale of forfeited property realizes less than the expenses incurred by the government in storing, maintaining, and selling the property, the net loss must be carried by the agency's budget. This occurs even though profits from other sales would be sufficient to offset these expenses. Thus, the financial resources of our law enforcement agencies are not augmented by profitable forfeitures, but they are depleted by those that are not profit producing.

Delays in obtaining civil forfeitures are a primary cause of the burgeoning expenses associated with forfeiture actions. Because of the backlog of civil cases in certain districts, obtaining a judicial forfeiture may take a significant amount of time. During this time the property is subject to deterioration and maintenance and storage costs mount. Under present law, such delays are frequently unavoidable even in uncontested cases, because the alternative of more efficient administrative forfeiture proceedings is not available if the value of the asset is $10,000 or more, a dollar ceiling that excludes many assets in drug forfeiture cases including virtually all boats and aircraft used in drug smuggling.

3. Provisions of the bill, as reported

Title III of the bill is divided into four parts. The first, designated Part A, is comprised of a single section 302. This section sets forth an amended version of 18 U.S.C. 1963, the provision of current law governing criminal forfeiture (and other applicable criminal penalties) under the RICO statute. One of the bill's significant amendments to the current RICO statute is clarification of the forfeitability of proceeds of racketeering activity. There is now a split in the circuits on whether such profits are subject to forfeiture under the RICO statute, and the Supreme Court has granted certiorari in *Russello* v. *United States* [21] to review this issue. Others of the more significant amendments to 18 U.S.C. 1963 are designed to address the problem noted above of defendants defeating criminal forfeiture actions by removing, concealing, or transferring forfeitable assets prior to conviction. These amendments include clarification for the basis on which restraining orders may issue, new authority permitting a restraining order prior to indictment in certain circumstances, a provision setting out clear authority for voiding improper pre-conviction transfers of assets subject to criminal forfeiture, and a provision authorizing the court to order the defendant to forfeit substitute assets when his property originally subject to forfeiture has been made unavailable at the time of conviction.

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[21] *United States* v. *Martino*, 681 F.2d 952 (5th Cir. 1982) (en banc) (holding proceeds of arson-for-profit scheme subject to RICO criminal forfeiture), *cert. granted sub nom. Russello* v. *United States*, 103 S. Ct. 721 (1982) (No. 82–472).

Part B of title III, which is comprised of sections 303 through 308, makes several amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 *et seq.*). The most significant of the amendments in Part B is the creation in section 303 of a new criminal forfeiture statute that would be applicable in all felony drug cases. The provisions of this new criminal forfeiture statute for major drug offenses closely parallel those of the RICO forfeiture provisions amended in section 302, and include the various criminal forfeiture improvements approved by the Committee. Part B of title III would also amend the civil forfeiture provisions of the narcotics laws to allow, in certain new circumstances, the forfeiture of real property, and to require the stay of civil forfeiture proceedings pending disposition of a related criminal case.

Part C of this title, which is made up of sections 309 and 310, establishes a four-year trial program under which amounts realized by the United States from the forfeiture of drug profits and other drug-related assets are to be placed in a special fund which is to be available for appropriations to defray expenses incurred by the government in civil and criminal forfeiture actions under title 21, United States Code.

Part D of title III, which is comprised of sections 311 through 323, amends various sections of the Tariff Act of 1930 (19 U.S.C. 1202 *et seq.*). These amendments are designed primarily to achieve two purposes. First, they improve the civil forfeiture provisions of the customs laws, which, by virtue of 21 U.S.C. 881(d), are also applicable to civil forfeitures of drug-related assets. Most notable of these amendments is the expansion of the availability of efficient administrative forfeiture proceedings in uncontested cases. Second, Part D creates a Customs Forfeiture Fund, like that established for drug forfeitures in Part C, that is to be available to meet expenses associated with seizures and forfeitures under customs laws.

SECTION-BY-SECTION ANALYSIS

SECTION 301

Section 301 provides that title III of the bill may be cited as the "Comprehensive Forfeiture Act of 1983."

PART A

SECTION 302

Section 302 amends 18 U.S.C. 1963, the provision of current law which prescribes the penalties, including criminal forfeiture, for violations of the RICO statute (18 U.S.C. 1961 *et seq.*). The current penalties of fine and imprisonment are retained, but the provisions relating to criminal forfeiture have been amended and expanded. Each of the subsections of 18 U.S.C. 1963, as amended in section 302, is discussed below:

18 U.S.C. 1963(a)

Section 1963(a), as amended, sets out the penalties for racketeering offenses in violation of 18 U.S.C. 1962. Current fine and imprisonment levels are unchanged. Paragraphs (1), (2), and (3) describe property of the defendant which is to be subject to criminal forfeiture. Paragraphs (1) and (2) carry forward (but in clearer format) the description of forfeitable property appearing in current 18 U.S.C. 1963(a) (1) and (2). Paragraph (3) is new, and specifically provides for the forfeiture of proceeds derived from prohibited racketeering activity or unlawful debt collection. Both direct and derivative proceeds are forfeitable. As noted above, several courts have held that racketeering proceeds are not encompassed within current RICO forfeiture provisions and Supreme Court review of this issue is now pending. This limiting interpretation has significantly diminished the utility of the RICO criminal forfeiture sanction and is at odds with the overall purpose of this statute. Clarification of the forfeitability of racketeering proceeds has been included in past forfeiture legislation and criminal code revision legislation.[22]

To come within the scope of paragraph (3), property must constitute, or be derived from, proceeds the defendant obtained through the racketeering activity involved in the RICO violation. Thus, proceeds accruing to an enterprise or association involved in a RICO violation will be forfeitable only to the extent that they are derived from racketeering activity or unlawful debt collection.[23] For example, if only part of a corporation's affairs were conducted through a pattern of racketeering activity, the gain produced through this activity would be subject to forfeiture but the legitimately produced profits of the corporation would not.

In paragraph (3), the term "proceeds" has been used in lieu of the term "profits" in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were.[24]

S. 829 as introduced, not only specifically added proceeds to the description of property subject to forfeiture under 18 U.S.C. 1963(a), it also rephrased the description of forfeitable property under current section 1963(a) (1) and (2). While the Committee did not object to the substance of this revision, for it did no more than attempt to more fully explain the scope of current law, the revision was complex and, in the Committee's view, unnecessary. Preserving the existing language of 18 U.S.C. 1963(a)(1) and (2) and adding a specific reference to proceeds was deemed a better approach and the Committee adopted an amendment to accomplish this result. The ambiguity regarding forfeiture of proceeds is resolved, yet the body of case law otherwise interpreting the existing provisions of the RICO forfeiture statute can be retained. The Department of Justice concurred in this judgment.

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[22] See S. Rept. No. 97-307, 97th Cong., 1st Sess. 995 (1981).

[23] The terms "racketeering activity" and "unlawful debt" are defined in 18 U.S.C. 1961.

[24] In *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part, vacated in part, 432 U.S. 137 (1977), the court took notice of the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits."

As amended by section 302 of the bill, 18 U.S.C. 1963(a) also makes it clear that its criminal forfeiture provisions are to apply irrespective of any contrary provisions in State law. In addition, the final sentence of section 1963(a) emphasizes the mandatory nature of criminal forfeiture, requiring the court to order forfeiture in addition to any other penalty imposed. This is in accord with case law holding the forfeiture provision of the present RICO statute to be mandatory on the trial court.[25]

18 U.S.C. 1963(b)

As amended, section 1963(b) emphasizes that property subject to forfeiture under the RICO statute may be either real property or tangible or intangible personal property, and underscores an intent, consistent with current law,[26] that the concept of "property" as used in section 1963 is to be broadly construed. Forfeiture legislation submitted by the Administration in the last Congress (S. 2320), and passed with amendments by the Senate as part of S. 2527, included in this provision a lengthy recitation of examples of types of property and interests that could be subject to a RICO forfeiture. In materials accompanying the submission of this bill, the Administration explained that this language had been dropped because it would be more appropriate to include such a discussion as part of the bill's legislative history. In essence, this language from the former forfeiture legislation emphasized the forfeitability of positions, offices, and employment contracts acquired or used in racketeering, of compensation or other benefits derived from such positions, and of amounts payable under contracts awarded or performed through racketeering. The Committee agrees that forfeiture of the right to exercise or benefit from such interests is fully consistent with the purposes of the RICO forfeiture sanction.

18 U.S.C. 1963(c)

Subsection (c) of 18 U.S.C. 1963, as amended by the bill, is a codification of the "taint" theory which has long been recognized in forfeiture cases.[27] Under this theory, forfeiture relates back to the time of the acts which give rise to the forfeiture. The interest of the United States in the property is to vest at that time, and is not necessarily extinguished simply because the defendant subsequently transfers his interest to another. Absent application of this principle a defendant could attempt to avoid criminal forfeiture by transferring his property to another person prior to conviction.[28]

The purpose of this provision is to permit the voiding of certain pre-conviction transfers and so close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not "arms' length" transactions. On the other hand, this provision should not operate to the detriment of innocent *bona fide* purchasers of the defendant's property. Therefore, section 1963(c), as amended by the bill, makes it clear that this provision may not result in the forfeiture of property acquired by an innocent *bona fide* purchaser. Such purchasers are entitled to relief under the new ancillary hearing procedure in section 1963(m) which was adopted by amendment by the Committee.

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[25] *United States* v. *Godoy*, 678 F.2d 84 (9th Cir. 1982), *petition for cert. filed*, No. 82-538 (Sept. 27, 1982); *United States* v. *L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

[26] See *United States* v. *Rubin*, 559 F.2d 975 (5th Cir.), vacated and remanded on other grounds, 439 U.S. 810 (1977), where the defendant was convicted on RICO and other charges arising out of embezzlement of union and employee welfare benefit plans and was ordered to forfeit his various union and benefit plan offices.

[27] See, *e.g.*, *United States* v. *Simons*, 541 F. 2d 1351, 1352 (9th Cir. 1976), citing *United States* v. *Stolwell*, 133 U.S. 1 (1890).

[28] This result was not permitted in *United States* v. *Long*, 654 F. 2d 911 (3rd Cir. 1981), in which it was held that property derived from a violation of 21 U.S.C. 848 remained subject to criminal forfeiture although transferred to the defendant's attorneys more than six months prior to conviction, and that an order restraining the attorneys from transferring or selling the property was properly entered.

Under this provision, the jury could render a special verdict of forfeiture with respect to property used or acquired by the defendant in a manner rendering it subject to forfeiture, irrespective of the fact that it may have been transferred to a third party subsequent to the acts of the defendant giving rise to the forfeiture. Resolution of claims of third parties asserting that they are innocent *bona fide* purchasers, claims that will determine whether a transfer is ultimately voided, may be reserved for the post-trial ancillary hearing.[29] This procedure provides for more orderly consideration both of the forfeiture issue and the legitimacy of third party claims. Moreover, even if a transfer is sustained at the ancillary hearing, the fact that the jury will have determined that the property would have been forfeitable if it had remained in the hands of the defendant will allow the court to order the forfeiture of substitute assets of the defendant as provided in 18 U.S.C. 1963(d), as amended, to assure that the defendant does not retain the gain received from this pre-conviction transfer.

18 U.S.C. 1963(d)

This provision is new to the law. It provides that where property found to be subject to forfeiture is no longer available at the time of conviction, the court is authorized to order the defendant to forfeit substitute assets of equivalent value. This subsection addresses one of the most serious impediments to significant criminal forfeitures. Presently, a defendant may succeed in avoiding the forfeiture sanction simply by transferring his assets to another, placing them beyond the jurisdiction of the court, or taking other actions to render his forfeitable property unavailable at the time of conviction. Under this new provision, forfeiture of substitute assets would be authorized in five circumstances: where property found subject to forfeiture under section 1963(a), as amended, (1) cannot be located; (2) has been tranferred to, sold to, or deposited with, a third party;[30] (3) has been placed beyond the jurisdiction of the court;[31] (4) has been substantially diminished in value by any act or omission of the defendant;[32] or (5) has been commingled with other property that cannot be divided without difficulty.

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[29] Where it is clear that a forfeitable asset has been sold for value to an innocent purchaser, the Committee expects that the government would seek forfeiture of substitute assets of the defendant, as provided in section 1963(d), at the conclusion of trial and avoid the necessity of the purchaser petitioning for a post-trial hearing.

[30] The authority to order the forfeiture of substitute assets must be understood in conjunction with section 1963(c), as amended, which allows, in certain circumstances, the voiding of transfers to third parties. The bill does not permit the government to obtain forfeiture both of the transferred property and of substitute assets. Instead, it permits the government to reach substitute assets where the property cannot be reached once transferred or where such action is a preferable alternative to seizure of property sold to an innocent purchaser.

[31] This provision should be particularly helpful in combatting the problem of use of offshore banks as safe havens for crime-related assets.

18 U.S.C. 1963(e)

This provision sets forth the authority of the courts to enter restraining orders to preserve the availability of forfeitable assets until the conclusion of trial. Like current 18 U.S.C. 1963(b), this authority allows the court to enter a restraining order, require the execution of a satisfactory performance bond, or take other action to preserve the government's ability to reach the defendant's forfeitable assets after conviction. This provision expands current restraining order authority, however, by allowing, in certain limited circumstances, the entry of a pre-indictment restraining order. As noted above, the courts presently have authority to enter restraining orders only after the filing of an indictment or information.[33]

It is not infrequent that a defendant becomes aware that he is the target of a criminal investigation before the time he is formally charged. Indeed, most complex criminal cases, such as RICO cases and drug trafficking conspiracies, are preceded by a grand jury investigation, and it is current Department of Justice policy generally to notify the subjects of a grand jury investigation so that they may have an opportunity to appear before the grand jury. Thus, whether through formal notice of an ongoing grand jury investigation or through other means, it is often the case that defendants become aware of the government's development of a case against them and as a consequence have both the incentive and opportunity to move to transfer or conceal forfeitable assets before the current jurisdiction of the courts to enter appropriate restraining orders may be invoked.

The new pre-indictment restraining order authority provided in section 1963(e), as amended, provides a mechanism to address this situation. However, since in such cases the government will be seeking to restrain the transfer or movement of property prior to the filing of formal charges, it is appropriate that this remedy be available only upon a strong showing by the government.

Paragraph (1)(A) provides that a restraining order may issue "upon the filing of an indictment or information charging a violation of section 1962 of this chapter [18 U.S.C. 1962] and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section." Thus, the probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order. While the court may consider factors bearing on the reasonableness of the order sought, it is not to "look behind" the indictment or require the government to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order. Since a warrant for the arrest of the defendant may issue upon the filing of an indictment or information, and so the indictment or information is sufficient to support a restraint on the defendant's liberty, it is clear that the same basis is sufficient to support a restraint on the defendant's ability to transfer or remove property alleged to be subject to criminal forfeiture in the indictment.

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[32] This provision will be of utility where a defendant substantially depletes a forfeitable asset in anticipation of its being ordered forfeited. It is phrased, however, so that it will not apply where the value of the property has been subject to minimal or ordinary depreciation.

[33] The same restraining order authority is set out in the other criminal forfeiture provision of current law, the CCE statute, 21 U.S.C. 848.

In contrast to the pre-indictment restraining order authority set out in paragraph (1)(B), the post-indictment restraining order provision does not require prior notice and opportunity for a hearing. The indictment or information itself gives notice of the government's intent to seek forfeiture of the property. Moverover, the necessity of quickly obtaining a restraining order after indictment in the criminal forfeiture context presents exigencies not present when restraining orders are sought in the ordinary civil context. This provision does not exclude, however, the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify the order or vacate an order that was clearly improper (*e.g.*, where information presented at the hearing shows that the property restrained was not among the property named in the indictment). However, it is stressed that at such a hearing the court is not to entertain challenges to the validity of the indictment. For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based.

Paragraph (1)(B) permits the court to enter a restraining order prior to indictment if, after notice and an opportunity for a hearing, the court determines that "there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture" and also determines that "that the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered." Thus, the standard for issuance of a restraining order prior to the filing of an indictment or information is a stringent one. It is stressed, however, that this stringent standard applies only in this context; it is not to be extended to restraining orders sought after indictment. A pre-indictment restraining order is to extend for no more than ninety days, unless extended by the court for good cause shown or unless an indictment or information has been filed in the interim.

Paragraph (2) describes those situations in which a pre-indictment restraining order may issue, on a temporary basis, without prior notice or opportunity for a hearing. In order to obtain such an *ex parte* order the government must establish probable cause to believe that the property is subject to forfeiture and that provision of notice would jeopardize the availability of the property. Certain types of property, particularly highly liquid assets forfeitable as proceeds of drug trafficking or cash producing racketeering schemes, may be easily moved, concealed or disposed of even in the relatively short period of time that may elapse between the giving of notice and the holding of an adversary hearing concerning the entry of a restraining order. In such cases, there may be a compelling need for a temporary *ex parte* order.

The permissibility of the postponement of notice and hearing until after the initial entry of a restraining order in a criminal forfeiture case has not been squarely addressed by the Supreme Court.[34] The Court has, however, addressed this issue with respect to the more intrusive action of *seizure* in the context of a civil forfeiture. In *Calero-Toledo* v. *Pearson Yacht Leasing Co.,*[35] a yacht on which marihuana was found was seized, pursuant to a civil forfeiture statute, without prior notice or adversary hearing. A three-judge district court, relying primarily on a 1972 Supreme court case,[36] held that the failure of the forfeiture statute to provide for preseizure notice and hearing rendered it unconstitutional. The Supreme Court reversed, holding that immediate seizure of a property interest, without an opportunity for a prior hearing, was permitted in these limited circumstances, because, first, the seizure statute served a significant governmental purpose, *i.e.,* preventing continued criminal use of the property and enforcing criminal sanctions; second, prior notice might frustrate the purpose of the statute, since the property could be removed, concealed, or destroyed if advance warning of the seizure were given; and third, unlike the situation in *Fuentes,* the seizure was not initiated by self-interested private parties, but rather by government officials. Since these considerations are also present where the government seeks simply to restrain the transfer or disposition of property that may be subject to criminal forfeiture, it seems clear that postponement of notice and hearing is permitted.

The sole purpose of the bill's restraining order provision, like that in the current RICO and CCE statutes, is to preserve the status quo, *i.e.,* to assure the availability of the property pending disposition of the criminal case. Nonetheless, in at least three cases, defendants have argued with mixed results that entry of a restraining order was impermissible in that it was inconsistent with the presumption of innocence.[37] In the Committee's view, the availability of restraining orders is essential in the area of criminal forfeiture and a pretrial restraining order for the purpose of preserving assets does not impinge on the trial concept of presumption of innocence.

The Committee adopted an amendment to the RICO restraining order provision adding a new paragraph (3). This amendment provides that information and evidence received at a hearing concerning a restraining order need not conform to the standards of admissibility set out in the Federal Rules of Evidence. If the rules of admissibility were to apply at such hearings, as has been held by the Ninth Circuit,[38] this would mean that the government could not rely on hearsay or proffer, and thus might be required to expose its witnesses prematurely. In certain cases, this may jeopardize the safety of witnesses or subject them to pressures that may dissuade them from testifying at trial. The cases to which criminal forfeiture are to apply under this bill, racketeering and drug trafficking cases, are the very sorts of cases in which the potential for intimidation of and danger to witnesses is of greatest concern. Generally, the Federal Rules of Evidence do not apply to "preliminary examinations in criminal cases." [39] In the Committee's view, there are compelling reasons for assuring that this principle extends to hearings concerning the entry of restraining orders in criminal forfeiture cases.

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[34] The United States has, however, filed a petition for certiorari to obtain review of this issue in *United States* v. *Crozier, supra* note 20.

[35] 416 U.S. 663 (1974).

[36] *Fuentes* v. *Shevin,* 407 U.S. 67 (1972).

[37] See *United States* v. *Scalzitti,* 408 F. Supp. 1014, 1015 (W.D. Pa. 1975) and *United States* v. *Bello,* 470 F. Supp. 723, 724–725 (S.D. Cal. 1979) (defendant was no more stripped of the presumption of innocence by a restraining order than would be the case were he required to post bond); but see *United States* v. *Mandel,* 408 F. Supp. 679, 682–684 (D. Md. 1976). The presumption of innocence is an evidentiary standard applied in criminal trials. It does not serve as a substantive bar to any interference with a defendant's interests prior to an adjudication of guilt. *Bell* v. *Wolfish,* 441 U.S. 520, 533 (1979).

[38] *United States* v. *Crozier, supra* note 20; *United States* v. *Spilotro,* 680 F.2d 612 (9th Cir. 1982).

18 U.S.C. 1963(f)

Subsection (f) of 18 U.S.C. 1963, as amended by the bill, governs matters arising during the period from the entry of the order of forfeiture until the time that the Attorney General directs disposition of the property. While this subsection addresses a number of issues, these provisions have been formulated to retain a degree of flexibility. Particularly in RICO cases, where forfeited property may include ongoing businesses, such flexibility is a necessity.

As is provided in current 18 U.S.C. 1963(c), upon conviction of the defendant the court is to enter a judgment of forfeiture [40] and authorize the Attorney General to seize the property upon such terms and conditions as the court shall deem proper.[41] After entry of the order of forfeiture, it may be necessary to obtain an accurate accounting of the property, and the property may continue to be vulnerable to depletion or transfer if it is not immediately seized. Thus, subsection (f) provides that the court may appoint receivers or trustees and may enter appropriate restraining orders. Subsection (f) also permits the use of income accruing to or derived from an enterprise to offset ordinary and necessary expenses of the enterprise that are legally required or which are necessary to protect the interests of the United States or third parties. Thus, the value of an enterprise may be preserved until it is disposed of.

18 U.S.C. 1963(g)

Subsection (g) concerns matters regarding the disposition of property. Following the seizure of the property, the Attorney General is authorized to direct its disposal by sale or other commercially feasible means, making due provision for the rights of any innocent persons. As in current law, this subsection provides that an interest that is not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant. However, unlike current law, subsection (g) specifically prohibits reacquisition by the defendant of property he has forfeited.

Since, under current practice, third parties who assert an interest in property which is the subject of criminal forfeiture may not intervene in the criminal case—a principle set out in subsection (j)—subsection (g) authorizes the court to stay disposition of the property pending an appeal of the criminal case, if the third party demonstrates that the disposition of the property will result in irreparable injury, harm, or loss to him.

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[39] Rule 1101(d)(3) of the Federal Rules of Evidence.

[40] When an indictment or information alleges that property is subject to criminal forfeiture, a special verdict must be returned as to the extent of the property subject to forfeiture. Rule 31 of the Federal Rules of Criminal Procedure.

[41] This is also the procedure mandated under Rule 32 of the Federal Rules of Criminal Procedure.

Once the property has been disposed of, the proceeds are to be used to pay the expenses of the forfeiture and sale, including costs arising from the seizure, maintenance, and custody of the property. The remaining amounts are to be deposited in the general fund of the Treasury.

18 U.S.C. 1963(h)

Subsection (h) of 18 U.S.C. 1963, as set forth in section 302 of the bill, describes several aspects of the authority of the Attorney General with respect to property that has been ordered forfeited. This authority is in essence carried forward from existing law, although in a more straightforward manner. Under 18 U.S.C. 1961, the Attorney General may designate other officials to exercise this authority or any other powers conferred upon him by the RICO statute. The authority described in subsection (h) includes: (1) granting petitions for remission or mitigation of forfeiture, restoring forfeited property to victims, and taking other actions to protect the rights of innocent persons; (2) compromising claims; (3) awarding compensation to persons providing information that led to a forfeiture; (4) directing the disposition, by the United States, of the property; and (5) taking measures to protect and maintain the property pending its disposition.

18 U.S.C. 1963(i)

In current 18 U.S.C. 1963(c), the procedures for disposition of the forfeited property, for consideration of petitions for remission and mitigation of forfeiture, and for other post-seizure matters are governed by the customs laws. In some respects, however, these customs laws provisions have been found not adequate to address some of the particularly complex issues that arise in RICO forfeiture cases. Subsection (i) of 18 U.S.C. 1963, as amended by the bill, therefore provides for the development and promulgation of regulations to govern certain post-seizure matters. These regulations may be drafted to address some of the unique problems that arise in RICO forfeitures. Pending the promulgation of these regulations, the currently applicable provisions of the customs laws would remain in effect.

18 U.S.C. 1963(j)

Subsection (j) of the RICO forfeiture provisions, as amended by the bill, sets forth the recognized principle that third parties may not intervene in the criminal case. Moreover, once the indictment or information is filed, a third party is not to commence a civil suit against the United States; instead the third party should avail himself of the ancillary hearing procedure added by the Committee as a final section of the RICO amendments (18 U.S.C. 1963(m)).[42] This provision assures a more orderly disposition of both the criminal case and third party claims. Indeed, it is anticipated that the new hearing procedure should provide for more expedited consideration of third party claims than would the filing of separate civil suits.

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[42] This provision is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order, however.

In S. 829 as introduced, this provision of the bill required third parties to exhaust the administrative remedy of petitioning the Attorney General for remission or mitigation of forfeiture before seeking judicial resolution of their claims. In light of the Committee's addition of the new ancillary hearing procedure in section 1963(m), which is based on the recognition that third parties asserting legal claims inconsistent with the order of forfeiture are entitled to a judicial resolution of their claims, the language of subsection (j) was amended to reflect the purpose and scope of the new hearing procedure.

18 U.S.C. 1963(k)

This new subsection of 18 U.S.C. 1963 simply emphasizes the jurisdiction of the court to enter under these criminal forfeiture provisions, without regard to the location of the property. This principle is one of the distinctions between civil and criminal forfeitures because in civil forfeitures, the power of the court currently extends only to property within the district in which it is located.

18 U.S.C. 1963(l)

Subsection (*l*) of 18 U.S.C. 1963, as amended by the bill, authorizes the court to order the taking of depositions to facilitate the identification and location of property that has been declared forfeited and the disposition of petitions for remission or mitigation of forfeiture. The taking of such depositions will provide for a more orderly and fair consideration of these matters and will permit the development of a more complete record.[43]

18 U.S.C. 1963(m)

This new subsection added to 18 U.S.C. 1963 was not included in S. 829 as introduced. It provides for an ancillary hearing to be held after conviction of the defendant at which third parties asserting a legal interest in property that has been ordered forfeited may obtain a judicial resolution of their claims.

Until recently, the Department of Justice had adhered to the position that all third parties, whether asserting a legal or equitable basis for relief from an order of criminal forfeiture, should, at least in the first instance, pursue the remedy of petitioning the Attorney General for remission or mitigation of forfeiture.[44] Traditionally, the Attorney General's decision with respect to such petitions, petitions which are most frequently filed as the result of civil forfeiture actions, has been viewed entirely as a matter of discretion and not subject to judicial review. Since third parties with interests in criminally forfeitable property may not participate in the criminal trial, while all parties with an interest in civilly forfeitable property may participate in judicial forfeiture proceedings, strict application of the principle of discretionary, nonreviewable administrative decisions on third party claims in the criminal forfeiture context had been of concern to the Committee.

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[43] Although this provision does not specify the same authority to order depositions for the purposes of resolving matters raised in a hearing occurring under section 1963(m), discussed below, in such judicial hearings, this authority would be part of the inherent power of the court.

[44] This practice was sanctioned in *United States* v. *Mandel*, 505 F. Supp. 189 (D. Md. 1981).

After introduction of S. 829, the Department of Justice informed the Committee that their position with respect to third party claims in the criminal forfeiture context had changed. The Department's new position is that third parties who assert claims to criminally forfeited property which, in essence, are challenges to the validity of the order of forfeiture are entitled to a judicial determination of their claims. Thus, it would be improper to require such parties to seek relief in the remission and mitigation process (as may have been implicit in the bill as introduced), since the granting of such petitions is solely a matter of executive discretion. However, the remission and mitigation process would remain the appropriate exlcusive remedy for third parties who assert not a legal basis for relief, but rather mere equitable grounds.

Criminal forfeiture is an *in personam* proceeding. Thus, an order of forfeiture may reach only property of the defendant, save in those instances where a transfer to a third party is voidable. Thus, if a third party can demonstrate that his interest in the forfeited property is exclusive of or superior to the interest of the defendant, the third party's claim renders that portion of the order of forfeiture reaching his interest invalid. The Committee strongly agrees with the Department of Justice that such third parties are entitled to judicial resolution of their claims.

There is, however, presently no statutory provision to specifically address procedures for the resolution of such claims in the criminal forfeiture context. The Department of Justice suggested, and the Committee agreed, that a procedure for expedited, judicial resolution of these claims be included in the criminal forfeiture provisions of the bill. The amendment adopted by the Committee adding a new subsection (m) to the RICO provisions provides such procedures and was drafted with the assistance of the Department of Justice.[45]

Under the new ancillary hearing procedure, the government, following the entry of an order of forfeiture is to publish notice of the order of forfeiture and its intent to dispose of the property. Direct written notice to interested third parties may serve as a substitute for published notice. Within thirty days after publication of notice or the receipt of direct notice, any third party asserting a legal interest in the property ordered forfeited may petition the court (the court having heard the criminal case) for a hearing to adjudicate the validity of his alleged interest. The hearing is to be held before the court alone.

If possible, the hearing is to be held within thirty days of the filing of the petition,[46] and the court may hold a consolidated hearing to resolve all or several petitions arising out of a single case. At the hearing, both the petitioner and the United States may present evidence and witnesses, and cross-examine witnesses who appear. In addition to evidence and testimony presented at the hearing, the court may consider relevant portions of the record of the criminal case. This will allow the court to quickly dispense with claims that have already been considered at trial, as for example, where the jury has already determined that the third party held the property only as a nominee of the defendant or that a transfer to the third party was a sham transaction.

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[45] The same provision has been added to the criminal forfeiture statute for all drug felonies set forth in section 303 of the bill.

[46] The court may decline to grant a hearing, for example, if the petition fails to state any basis for relief described in this provision.

Paragraph (6) provides that a third party will prevail if his claim falls into one of two categories: first, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a *bona fide* purchase for value and had no reason to believe that the property was subject to forfeiture.[47] Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party. However, the petitioner is held only to a preponderance of the evidence standard. Following the court's disposition of all third party petitions, or if no third party filed a petition within the time allowed, the United States would then have clear title to the property. This final provision attempts to address the problems increasingly encountered by the government in selling criminally forfeited property because of concerns about the government's ability to convey clear title to such property in the absence of a judicial resolution of third party claims.

A third party who fails to obtain relief under the new ancillary hearing provision or who does not file a petition for a hearing may seek equitable relief from the Attorney General by filing a petition for remission or mitigation of forfeiture. The Attorney General's decision on such petition shall not be subject to judicial review, as is the case under current law.

PART B

SECTION 303

Section 303 of title III amends the Comprehensive Drug Abuse Prevention and Control Act of 1970[48] by adding a new section which sets forth a criminal forfeiture statute that is to be applicable to all felony offenses under the Act. This statute is, in nearly all respects, identical to the RICO criminal forfeiture statute as amended in section 302 of the bill. Currently, the CCE statute,[49] which punishes those who control a group of five or more persons who are engaged in continuing drug-related crimes, is the sole provision of title 21, United States Code, which provides for the sanction of criminal forfeiture. However, the civil forfeiture provisions of title 21[50] are quite broad and permit the forfeiture of a variety of property used in drug offenses, including the proceeds of drug transactions. Civil forfeiture has certain advantages over criminal forfeiture. For example, the standard of proof is lower, the government commences its case with seizure of the property, thus reducing the opportunities for improper disposition of forfeitable assets, and civil forfeiture may be used when prosecution is not possible as where the defendant owner is a fugitive. On the other hand, there are certain drawbacks to civil forfeiture that could be avoided if prosecutors had the option of seeking criminal forfeiture in all major drug cases.

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[47] The provision should be construed to deny relief to third parties acting as nominees of the defendant or who have knowingly engaged in sham or fraudulent transactions. The standard for relief reflects the principles concerning voiding of transfers set out in 18 U.S.C. 1963(c), as amended by the bill.

[48] 21 U.S.C. 801 *et seq.*

[49] 21 U.S.C. 848.

Civil forfeiture is an *in rem* proceeding against the property itself, and thus a separate civil action must be filed in each district in which the property is located. In cases of large drug trafficking operations, forfeitable property may be located in several districts. Thus, separate but parallel civil actions must be filed in each district in which such property is located. Criminal forfeiture, on the other hand, is an *in personam* action, and therefore the jurisdiction of the court to enter orders affecting property subject to criminal forfeiture is not limited to property within the district in which the criminal case is tried.

Where the issues relating to civil forfeiture are the same as or closely related to those that will arise in the prosecution of a drug offense, it is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings against property of the defendant even though the evidence presented in the criminal case will be largely dispositive of the civil forfeiture action. The forfeiture of more significant amounts of drug-related property would likely be achieved if the judge and jury considering the criminal case were also permitted to determine the forfeiture issue, and the prosecutor and investigators who have prepared the criminal case can more readily apply their energy and expertise to an aggressive pursuit of criminal forfeiture.

Thus, a more efficient mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking or of other property he has used in the offense is to permit the criminal forfeiture of such property and thereby consolidate the forfeiture action with the criminal prosecution. Section 303 creates such a mechanism. To the greatest extent possible, the provisions of the title 21 criminal forfeiture statute set out in section 303 of the bill parallel those of amended RICO criminal forfeiture provisions set out in section 302.

The new criminal forfeiture statute created in section 303 of the bill is to appear as section 413 of the Comprehensive Drug Abuse Prevention and Control Act. This statute is divided into the following subsections:

Subsection (a)—Property subject to criminal forfeiture

Subsection (a) provides that the criminal forfeiture sanction created in section 303 of the bill is to apply to all drug felonies in titles II and III of the Comprehensive Drug Abuse Prevention and

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[50] 21 U.S.C. 881.

Control Act.[51] The types of property which are to be subject to an order of criminal forfeiture are described in paragraphs (1), (2), and (3) of subsection (a). The first category of property is that which constitutes or is derived from the proceeds the defendant obtained as a result of the violation for which he was convicted. The same type of property is now subject to civil forfeiture under 21 U.S.C. 881(a)(6). The reasons for using the term "proceeds" to define this type of property were discussed *supra* in the context of the amendments to the RICO criminal forfeiture provisions. The type of property which is subject to criminal forfeiture under paragraph (2) is that which is "used, or intended to be used * * * to commit, or to facilitate the commission of" the offense for which the defendant was convicted. This is generally the manner in which property subject to civil forfeiture is defined in 21 U.S.C. 881, although section 881 refers to specific types of property such as vehicles, records, containers, and equipment. Subsection (a)(2) of the bill's criminal forfeiture statute, on the other hand, refers simply to "property" used in the violation.

The description of property subject to criminal forfeiture which is set out in subsection (a)(3) carries forward that portion of the present CCE statute which authorizes the forfeiture of interests in, or which afford a source of control over, a continuing criminal enterprise.[52]

Subsection (a) also emphasizes that the entry of an order of forfeiture is mandatory following conviction. The mandatory nature of criminal forfeiture was discussed *supra* in the context of the RICO forfeiture amendments.

Subsection (b)—Meaning of term "property"

Like 18 U.S.C. 1963(b), as amended in section 302 of the bill, this subsection of the narcotics criminal forfeiture statute makes it clear that property subject to criminal forfeiture may be real property or tangible or intangible personal property.

Subsection (c)—Third party transfers

This subsection sets forth the same principles allowing the voiding of certain pre-conviction transfers of forfeitable assets. It is identical to subsection (c) of the RICO forfeiture provisions as amended in section 302 of the bill. For further discussion of this provision, see the analysis concerning 18 U.S.C. 1963(c), as amended, *supra*.

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[51] The felony offenses under titles II and III of the Comprehensive Drug Abuse Prevention and Control Act are violations of 21 U.S.C. 841 (except first offenses involving Schedule V substances and distribution of small amounts of marihuana for no remuneration); 21 U.S.C. 842 (in cases of repeat violations of certain more serious regulatory offenses); 21 U.S.C. 843 (which addresses knowing and intentional violations concerning fraud and offenses involving counterfeit substances, and also the use of communications facilities in committing felonies under the Act); 21 U.S.C. 844(a) (second offense of possession); 21 U.S.C. 845 (providing special penalties for distribution to persons under 21); 21 U.S.C. 846 (attempt and conspiracy where the underlying offense was a felony); 21 U.S.C. 848 (continuing criminal enterprise); 21 U.S.C. 952 (importation of controlled substances); 21 U.S.C. 953 (exportation of controlled substances); 21 U.S.C. 955 (possession of Schedule I or II or narcotic drugs on board vessels arriving in or departing the United States); 21 U.S.C. 955a (manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels); 21 U.S.C. 955c (attempt or conspiracy to commit a violation of 21 U.S.C. 955a); 21 U.S.C. 957 (export and import by certain nonregistrants); 21 U.S.C. 959 (manufacture or distribution for purposes of unlawful importation); 21 U.S.C. 963 (attempt or conspiracy to commit felony importation offenses of title III of the Act).

[52] The separate criminal forfeiture provisions of 21 U.S.C. 848 are repealed in section 305 of the bill.

Subsection (d)—Substitute assets

Subsection (d) of the new drug criminal forfeiture provision sets out the same provision authorizing the forfeiture or substitute assets of the defendant as is included in the RICO forfeiture amendments in section 302 of the bill. For a further discussion of this provision see the analysis of section 302 above concerning new 18 U.S.C. 1963(d).

Subsection (e)—Presumption of forfeitability

The extremely lucrative nature of drug trafficking is well established, and indeed is a primary reason why the forfeiture of the proceeds of drug transactions is necessary to effectively deter and punish such conduct. However, it is often difficult to produce direct evidence that particular property of a defendant constitutes, or was purchased with, such proceeds. There are certain circumstances which are indicative of the fact that particular property does represent such proceeds. The purpose of subsection (e) is to establish a permissive inference that property is subject to forfeiture when such circumstances are established.

As introduced, S. 829 did not contain this provision. However, the explanatory materials which accompanied the President's transmittal of this legislation to the Congress referred to such a provision. Thus its omission may have been inadvertent. Since the Committee determined that such a presumption would be extremely useful in obtaining the forfeiture of the huge profits produced by illicit drug trafficking, it adopted an amendment inserting this provision. This presumption is drawn from an analogous section of the forfeiture provisions of H.R. 3963, as passed by the House and Senate at the close of the 97th Congress.[53]

In order to invoke the inference set out in subsection (e) that particular property is subject to criminal forfeiture under the narcotics forfeiture statute of section 303 of the bill, two elements must be established by the government. First, the defendant must have acquired the property during, or within a reasonably related time after, the period during which he committed the violation for which he was convicted. Second, there must be no likely source for the property other than the violation. This second element is akin to the familiar "net worth" method of proof commonly used in tax cases. Once these factors are established, the trier of fact may reject application of the presumption, or more accurately, the inference set out in subsection (e) if it is not merited under the facts of the case or in light of evidence produced by the defendant which would bring into question its validity if it were applied.

Framed as a permissive and rebuttable inference rather than a mandatory presumption, the presumption in subsection (e) would appear to meet constitutional requirements.[54]

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[53] As previously noted, the President withheld approval of this measure for reasons unrelated to the forfeiture provisions.

[54] See *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979).

Subsection (f)—Protective orders

Subsection (f) authorizes the courts to enter appropriate restraining orders and injunctions, require the execution of performance bonds, and takes other actions to protect the availability of property that may be subject to criminal forfeiture. This authority is the same as that provided in the analogous provision of the amendments to the RICO criminal forfeiture statute in section 302. For a discussion of this protective order provision, see the analysis *supra* of that part of section 302 relating to 18 U.S.C. 1963(e).

Subsection (g)—Warrant of seizure

This subsection of the new criminal forfeiture statute set out in section 303 authorizes the court to issue a warrant of seizure, based upon a probable cause showing, if it further determines that a protective order issued under subsection (f) would not be sufficient to assure the availability of the property for forfeiture. The types of property subject to forfeiture in narcotics cases are often in forms that are easily moved or concealed, or are highly liquid. With respect to this type of property, entry of a restraining order may not be adequate to assure that the property will be available in the event the defendant is convicted. In such cases, it may be necessary for the government to seize the property and either take custody of it or transfer custody to the court.

Subsection (h)—Execution

This subsection, which deals with matters after the entry of the order of forfeiture up to the time that the property is to be disposed of, corresponds to proposed 18 U.S.C. 1963(f) as set out in section 302 of the bill. Therefore, the analysis of that provision should be referred to with respect to this subsection.

Subsection (i)—Disposition of property

Subsection (i), which deals with matters concerning the disposition of property that has been ordered forfeited, correponds to proposed 18 U.S.C. 1963(g) as set out in section 302 of the bill. Again, the analysis of that portion of the amended RICO forfeiture provision applies to this subsection.

Subsection (j)—Authority of the Attorney General

This subsection, like the analogous provision of the amended RICO forfeiture provision set out in section 302 of the bill, enumerates the authority of the Attorney General [55] with respect to certain matters concerning forfeited property. These powers include granting petitions for remission or mitigation of forfeiture and taking other actions to protect the interests of innocent persons, compromising claims concerning forfeited property, making awards of compensation, directing disposition of forfeited property by the United States,[56] and taking appropriate measures to maintain and safeguard forfeited property pending its disposition.

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[55] As authorized in 21 U.S.C. 871, all functions vested in the Attorney General under the Comprehensive Drug Abuse Prevention and Control Act of 1970 have been delegated to the Drug Enforcement Administration by regulation. See 28 C.F.R. 0.100(b).

[56] Disposition of forfeited property is to be governed by 21 U.S.C. 881(e).

Subsection (k)—Applicability of civil forfeiture provisions

Subsection (k) provides that, except to the extent that they are inconsistent with provisions of the proposed criminal forfeiture statute set out in section 303 of the bill, the provisions of 21 U.S.C. 881(d) are to apply to criminal forfeitures under the proposed statute. The provisions of 21 U.S.C. 881(d) state that such matters as the disposition of forfeited property and proceeds from the sale thereof, remission and mitigation of forfeitures, and the compromise of claims arising out of forfeiture actions are to be governed by the analogous provisions of the customs laws. Currently, these aspects of the customs laws apply both to civil forfeitures under 21 U.S.C. 881(a) and criminal forfeitures under the CCE statute (21 U.S.C. 848).

Subsection (l)—Bar on intervention

Like subsection (j) of the RICO forfeiture statute as amended in section 302 of the bill, this subsection bars intervention by third parties in the criminal case and provides that once the criminal case is commenced, any third party with a claim arising out of the forfeiture action should seek relief under the ancillary hearing procedure set forth in subsection (o) rather than file any separate civil suit against the United States. For further discussion of this provision see the analysis *supra* of the analogous RICO provision set forth in section 302 of the bill.

Subsection (m)—Jurisdiction to enter orders

Like subsection (k) of the bill's amendment of the RICO forfeiture provisions, this subsection simply emphasizes that the court may enter orders in a criminal forfeiture case without regard to the location of the property that may be subject to criminal forfeiture or that has been ordered criminally forfeited.

Subsection (n)—Depositions

This subsection authorizes the court to order the taking of depositions to facilitate the location and identification of property that has been ordered criminally forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture. The same language appears as subsection (1) of the proposed revision of the RICO forfeiture provisions in section 302 of the bill. See the analysis of proposed 18 U.S.C. 1963 (1) *Supra.* This authority supplements the authority to take testimony regarding petitions for remission or mitigation of forfeiture now set out in 19 U.S.C. 1618.

Subsection (o)—Ancillary hearing to resolve third party claims

This subsection sets forth the same ancillary hearing provision for judicial resolution of third party claims as that which appears as 18 U.S.C. 1963(m) section 302 of the bill. The analysis of that part of section 302 should be referred to for explanation of this provision.

SECTION 304

21 U.S.C. 824(f) provides for the forfeiture of controlled substances that are held by a distributor, dispenser, or manufacturer

of controlled substances whose registration has been revoked. This amendment to 21 U.S.C. 824(f) simply codifies the "taint" theory discussed *supra*. The principle that the interest of the United States in forfeited property vests at the time of the acts giving rise to the forfeiture is well established in the context of civil forfeitures.

SECTION 305

Section 305 of the bill simply deletes the separate criminal forfeiture provisions of the Continuing Criminal Enterprise statute set out at 21 U.S.C. 848. Criminal forfeitures arising out of a violation of the CCE statute are to be governed by the new criminal forfeiture statute set out in section 303 of the bill.

SECTION 306

Section 306 of the bill amends certain provisions of 21 U.S.C. 881, which provides for the civil forfeiture of a variety of drug-related property, and which also governs certain procedural matters both in civil forfeitures and in criminal forfeitures under the CCE statute.

The first amendment would add to the list of property subject to civil forfeiture set out in section 881(a) real property which is used or intended to be used in a felony violation of the Drug Abuse Prevention and Control Act. This provision would also include an "innocent owner" exception like that now included in those provisions permitting the civil forfeiture of certain vehicles and moneys or securities.

The amendments to subsections (b), (c), (d), and (e) of section 881 are essentially technical or conforming amendments. As noted above, certain of these provisions apply not only to civil forfeitures but also to criminal forfeitures under the current CCE statute, since these provisions of section 881 refer simply to forfeitures "under this subchapter." To clarify the applicability of these provisions to both civil and criminal forfeitures, appropriate clarifying language has been inserted.

Section 306 also adds two new subsections at the end of section 881. The first provides that all right, title, and interest in property which is subject to civil forfeiture under section 881(a) vests in the United States upon the commission of the acts giving rise to the forfeiture. As discussed above, this principle is well established in current law. The second new subsection to be added to section 881 provides for a stay of civil forfeiture proceedings when the government has commenced a criminal case that involves issues the same as or related to those on which the forfeiture action is based. Generally, the courts have been willing to grant such stays of civil forfeiture proceedings when the government has commenced a criminal action concerning the same acts that have given rise to the forfeiture.[57] Absent such a stay, the government may be compelled in the context of the civil forfeiture action to disclose prematurely aspects of its criminal case.

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[57] When both civil and criminal proceedings arise out of the same or related transactions, the government is, as a general rule, entitled to a stay of discovery in the civil action until disposition of the criminal matter. See, e.g., *United States* v. *One 1967 Buick Hardtop Electra*, 304 F. Supp. 1402 (W.D. Pa. 1969), and cases cited therein.

SECTION 307

Section 307 simply adds a new section at the end of title III of the Comprehensive Drug Abuse Prevention and Control Act to make it clear that the criminal forfeiture·statute proposed in section 303 of the bill, which is to be located in title II of the Act, applies to felony violations of title III of the Act as well. Title III of the Act governs offenses concerning the importation and exportation of controlled substances.

SECTION 308

Section 308 of the bill amends the table of contents of the Comprehensive Drug Abuse Prevention and Control Act of 1970 to reflect the two new sections added by sections 303 and 307 of the bill.

PART C

SECTION 309

Section 309 amends U.S.C. 881(e) to achieve two purposes. First, it provides that the Attorney General may transfer drug-related property forfeited under title 21, United States Code, to another Federal agency, or to an assisting State or local agency, pursuant to section 616 of the Tariff Act (19 U.S.C. 1616), as amended in section 318 of the bill. Often, State and local law enforcement agencies give significant assistance in drug investigations that result in forfeitures to the United States. However, there is presently no mechanism whereby the forfeited property may be directly transferred to these agencies for their official use. This amendment, in conjunction with the Tariff Act amendment cited above, will permit such transfers and thereby should enhance important cooperation between Federal, State, and local law enforcement agencies in drug investigations. The second amendment to 21 U.S.C. 881(e) provides for the deposit of moneys realized by the United States in drug forfeitures into the Drug Assets Forfeiture Fund created by section 310.

SECTION 310

Section 310 amends 21 U.S.C. 881 by adding a new subsection (j) that would create, for a trial four-year period, a Drug Assets Forfeiture Fund from which moneys could be appropriated to defray the mounting costs associated with forfeiture actions. (A similar fund for customs forfeitures is created in section 317 of the bill.) Presently, when any amounts are realized by the United States from the forfeiture of drug-related assets, these amounts must be deposited in the general fund of the Treasury. Therefore, they are not available to defray the expenses of forfeiture in those cases where the expenses associated with the forfeiture of a particular piece of property exceed the amount realized by the sale of the property.

Under new subsection (j), the amounts realized in profitable forfeitures would be deposited in a Drug Assets Forfeiture Fund which would be available, through the appropriations process, for payments, at the discretion of the Attorney General, for four specified purposes. These purposes are: (1) the payment of expenses necessary to inventory, safeguard, maintain, advertise or sell the property, including payments for contract services or payments to State and local agencies which may provide these services; (2) payments for information or assistance relating to a drug investigation or leading to a forfeiture of drug assets; (3) the compromise and payment of valid liens against forfeited property; and (4) disbursements to innocent persons in connection with the remission and mitigation of forfeiture. Reward payments from the fund in excess of $10,000 must be authorized by either the Attorney General, Deputy or Associate Attorney General Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. These rewards also may not exceed a maximum of $150,000, or, in the case of a reward in a forfeiture case, the lesser of $150,000 or one quarter the amount realized by the United States in the forfeiture action.

The authorized level of appropriations from the Fund for fiscal years 1984 through 1988 ranges from $10,000,000 in the first year to $20,000,000 in the last two years, but is not to exceed the total amount deposited in the Fund in the prior fiscal year. This appropriation ceiling applies to money for the first three purposes of the Fund specified in subsection (j)(1). For the fourth purpose—disbursements to innocent persons granted remission or mitigation of forfeiture—moneys may be appropriated from the Fund as may be necessary. Not less than four months after the end of each fiscal year, the Attorney General is to submit to the Congress a detailed report on the amounts deposited in the Fund and expenditures made out of moneys appropriated from the Fund.

PART D

Part D of title III of the bill sets forth several amendments to the Tariff Act of 1930. These provisions govern the seizure and civil forfeiture of property under the customs laws, and are also applicable, by virtue of 21 U.S.C. 881, to seizure and forfeiture of drug-related property. Briefly, these amendments provide for: (1) the expanded use of efficient administrative forfeiture proceedings in cases in which no party comes forward to contest a civil forfeiture action; (2) enhanced cooperation between Federal and State and local law enforcement agencies by permitting the transfer of federally forfeited property to assisting State and local agencies and by providing clear authority for the discontinuance of Federal forfeiture actions in favor of forfeitures under State law; and (3) the creation of a Customs Forfeiture Fund to be available to defray expenses associated with forfeiture actions under the customs laws.

SECTION 311

Section 311 amends 19 U.S.C. 1607, which in conjunction with sections 1608 and 1609 of title 19, United States Code, currently governs the procedures for the forfeiture of property valued at

$10,000 or less. Under these provisions, notice of the seizure of the property is to be published and written notice is to be given to each party who appears to have an interest in the property. If no party comes forward to contest the forfeiture, the property may be forfeited in an administrative proceeding pursuant to 19 U.S.C. 1609. If a party does contest the forfeiture and posts the bond required under 19 U.S.C. 1608, a judicial proceeding must be held regarding the forfeiture. Significant numbers of forfeitures under the drug and customs laws are uncontested. However, the more efficient administrative forfeiture proceeding is available only with respect to a limited number of these cases because the property involved frequently exceeds the current $10,000 valuation ceiling. Thus, in a significant number of cases, judicial proceedings are required even though the forfeiture action goes uncontested. In these cases, the overcrowding of court dockets often means a delay of more than one year before the case may be heard, and during this period of delay the property is subject to deterioration and the costs to the government in maintaining and safeguarding the property escalate. To address this problem, section 311 and other of the amendments set out in Part D amend current law to make administrative forfeiture proceedings available in uncontested cases involving: (1) property of a value of up $100,000; (2) any property the importation of which is prohibited (as under current law); and (3) any conveyances used to transport illicit drugs.

SECTION 312

Section 312 amends 19 U.S.C. 1608 to increase the amount of bond which is to be filed by a party wishing to contest the forfeiture of property subject to the provisions of 19 U.S.C. 1607 (*i.e.*, property valued at $100,000 or less, or conveyances of illicit drugs) in a judicial proceeding. Under current law, this bond is set at $250, an amount so low that it neither acts to discourage the filing of clearly frivolous suits nor reflects the substantial costs to the government in pursuing a judicial forfeiture.[58] As amended by section 312, the bond would be set at the lesser of $5,000 or 10 percent of the value of the property, but in no event less than $250. This increased bond is also a reflection of the fact that in light of section 311's amendment to 19 U.S.C. 1607, the bond provision will apply to cases involving property of significantly greater value than under present law. Of course, the bond requirement is subject to the established authority of the courts to reduce or dispense with a required bond where a claimant is unable to post it.

SECTION 313

Section 313 amends 19 U.S.C. 1609 to provide for the deposit of the proceeds of the sale of property forfeited under the customs law into the Customs Forfeiture Fund established in section 317.

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[58] The current $250 bond amount dates from 1844 when the limit on the value of property subject to administrative forfeiture was only $100.

SECTION 314

Section 314 amends 19 U.S.C. 1610 to conform to the amendments discussed above regarding 19 U.S.C. 1607. As under current law, section 1610 requires a judicial forfeiture for all property not governed by the procedures set out in sections 1607 through 1609 of title 19, United States Code. Thus, if the value of the property seized exceeds the limits described in 19 U.S.C. 1607, as amended in section 311 of the bill, a judicial forfeiture is required regardless of whether the forfeiture is contested.

SECTION 315

Section 315 sets forth an amendment to 19 U.S.C. 1612, which permits, in certain circumstances, the summary sale of a wasting asset, to conform with the amendment to 19 U.S.C. 1607, discussed above in relation to section 311 to the bill.

SECTION 316

Section 316 sets forth conforming amendments to 19 U.S.C. 1613 to provide for the deposit of customs forfeiture proceeds into the Customs Forfeiture Fund established in section 317 of the bill.

SECTION 317

Section 317 amends the Tariff Act by creating a new section that will provide for the deposit of the proceeds of forfeitures under the customs laws into a Customs Forfeiture Fund which is to be available for the payment of expenses associated with forfeiture actions. It parallels the Drug Assets Forfeiture Fund established in section 310.[59]

SECTION 318

Section 318 creates a new section 616 of the Tariff Act (19 U.S.C. 1616) to govern certain dispositions of forfeited property. Subsection (a) of this new section permits the transfer of forfeited property to another Federal agency, or to a State or local agency which participated in the case which led to the forfeiture. Subsection (b) provides for the discontinuance of a Federal forfeiture action in favor of State or local forfeiture proceedings. Subsection (c) makes clear the authority of the United States to transfer the seized property directly to State or local authorities where a forfeiture action is discontinued under subsection (b), and subsection (d) provides for notice to be given to all interested parties to advise them of such a discontinuance of Federal proceedings.

SECTION 319

Section 319 amends 19 U.S.C. 1619 to increase from $50,000 to $150,000 the maximum amount of a reward that may be paid for information leading to a forfeiture. As under current law, however, the amount of such an award may not exceed one-fourth of the amount realized by the United States from the forfeiture.

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[59] The Drug Assets Fund may be used, in addition to paying expenses and rewards, for payment of liens and payments associated with remission and mitigation, when appropriate. The Custom Forfeiture Fund does not include these additional purposes, but the Customs Service retains its existing authority to make such payments out of sale proceeds under 19 U.S.C. 1613.

SECTION 320

Section 320 adds a new section 589 to the Tariff Act which describes the law enforcement authorities of customs officers. In particular, this new provision will cure certain gaps in the current arrest authority of customs officers. Statutory arrest authority of customs officers is now confined to violations involving a limited number of statutes.[60] Customs officers making arrests for export violations, assaults on customs officers, and other Federal felony violations must rely on various State laws conferring arrest authority on private persons ("citizen's arrest" authority) unless State law confers peace officer status on them.[61] This reliance on fifty different State laws is confusing and inconsistent with the authority conferred upon other Federal officers. In other instances where customs officers have been charged with the responsibility of protecting Federal property and employees, it has been necessary that they be sworn in as deputy United States Marshals to assure that they have adequate law enforcement powers.[62] This procedure has proven to be inefficient, cumbersome, and inadequate.

The new section of the Tariff Act added by section 320 of the bill would authorize customs officers to make an arrest without a warrant for any offense against the United States committed in the officer's presence or for any Federal felony committed outside the officer's presence if the officer has reasonable grounds to believe the person to be arrested has committed or is committing the felony. In addition, this new provision carries forward the existing authority set out in section 7607 of the Internal Revenue Code [63] for customs officers to carry firearms, execute and serve arrest and search warrants, subpoenas, summons, and court orders.

SECTION 321

Section 321 amends several sections of the Tariff Act to provide that the seizure and forfeiture of aircraft is treated in the same manner as the seizure and forfeiture of other conveyances. Other amendments to the Tariff Act in preceding sections of Part D of title III provided for the same change.

SECTION 322

Section 322 amends 19 U.S.C. 1644 to correct an outdated reference to 49 U.S.C. 177 by substituting a reference to the currently applicable provision of the Federal Aviation Act.

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[60] A customs officer has authority to arrest without a warrant for violations of the narcotic drug and marihuana laws under section 7607 of the Internal Revenue Code, for violations of the navigation laws if committed in the officer's presence, and for violations of revenue laws under 19 U.S.C. 1581.

[61] *United States* v. *Swarovski*, 557 F.2d 40 (2d Cir. 1977); *United States* v. *Heliczer*, 373 F.2d 241 (2d Cir. 1967), *cert. denied*, 388 U.S. 1917 (1967).

[62] This occurred, for example, in the case of the Federal air security program and the "Cuban Freedom Flotilla" program.

[63] This provision of the Internal Revenue Code is repealed in subsection (b) of section 320 of the bill.

SECTION 323

Section 323 adds a new section 600 to the Tariff Act to make it clear that all seizures effected by customs officers are to be governed by sections 602 through 609 of the Tariff Act unless other procedures for seizure are provided.

TITLE IV—OFFENDERS WITH MENTAL DISEASE OR DEFECT

INTRODUCTION

Title IV of the bill amends various provisions of title 18, United States Code, and the Federal Rules of Criminal Procedure relating to the insanity defense and the procedures to be followed in Federal courts with respect to offenders who are or have been suffering from a mental disease or defect. The legislation includes a definition of the insanity defense that will substantially narrow the definition, which has evolved from case law, presently applied in the Federal system. Title IV also provides that the defendant shall have the burden of proving the insanity defense by clear and convincing evidence and prohibits expert opinion testimony on the ultimate legal issue of whether the defendant was insane. Title IV sets out procedures for determining competency to stand trial. Most significantly, title IV, for the first time in the Federal system outside of the District of Columbia, establishes a procedure for committing a defendant who is found not guilty only by reason of insanity. Under this procedure, the defendant is committed to a mental hospital for evaluation and continued custody in the event he or she remains so mentally ill as to present a danger to the community.

Many of the provisions in this title have evolved over a number of years in the context of efforts of the Senate Committee on the Judiciary to modernize the Federal criminal code.[1] More recently, extensive hearings have been held focusing primarily on the insanity defense itself and related issues.[2]

The difficulties experienced under the current Federal insanity defense center on three major areas: (1) the definition of the defense; (2) the burden of proof; and (3) the scope of expert testimony.

The problems presented by a defense, such as insanity, that involves the introduction into evidence at trial of inherently imprecise expert testimony, and the potential for jury error when considering the same, can be appreciated by a consideration of what is prone to happen at a typical trial in which the defendant raises the insanity defense. As described by the Department of Justice in testimony on S. 829: [3]

> [I]n a trial involving the insanity defense, the defendant's commission of the acts in question is commonly conceded or at least not seriously contested. Instead the trial

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[1] See, e.g., S. 1630, subchapter B of chapter 36, as reported; S. Rept. No. 97-307, 97th Cong., 1st Sess., pp. 95-108, 1191-1213 (1981).

[2] *The Insanity Defense*, Hearings before the Committee on the Judiciary, United States Senate, 97th Cong., 2d sess. (1982); *Limiting the Insanity Defense*, Hearings before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 97th Cong., 2d sess. (1982).

[3] Crime Control Act Hearings (statement of the Department of Justice, pp. 55-56).

centers around the issue of insanity and the key participants are highly paid psychiatrists who offer conflicting opinions on the defendant's sanity. Unfortunately for the jury and for society, the terms used in any statement of the defense—for example the term "paranoid schizophrenia"—are often not defined and the experts themselves disagree on their meaning. In addition, the experts often do not agree on the extent to which behavior patterns or mental disorders that have been labeled "schizophrenia," "inadequate personality," and "abnormal personality" actually cause or impel a person to act in a certain way. For example, a December, 1982, statement by the American Psychiatric Association on the insanity defense noted that "[t]he line between an irresistible impulse, and an impulse not resisted is probably no sharper than that between twilight and dusk."

Since the experts themselves are in disagreement about both the meaning of the terms used to define the defendant's mental state and the effect of a particular state on the defendant's actions—but still freely allowed to state their opinion to the jury on the ultimate question of the defendant's sanity—it is small wonder that trials involving an insanity defense are arduous, expensive, and worst of all, thoroughly confusing to the jury. Indeed the disagreement of the experts is so basic that it makes rational deliberation by the jury virtually impossible. Thus, it is not surprising that the jury's decision can be strongly influenced by the procedural question of which side must carry the burden of proof on the question of insanity.

THE INSANITY DEFENSE AND RELATED ISSUES

1. Present Federal law

a. The defense

Congress has never enacted legislation on the insanity defense. The Supreme Court has generally left development of standards to the courts of appeals and those courts, over many years, have gradually broadened the defense.

The foundation of the defense was established in *M'Naghten's* case,[4] in which the "right-wrong" test was introduced:

> To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

The next step was the widespread adoption of an additional volition test, exculpating a defendant who knew what he was doing and that it was wrong, but whose actions were deemed, because of mental disease, to be beyond his control.[5] This is sometimes called the "irresistible impulse" addition to the *M'Naghten* test. However, because its formulation frequently does not require that the abnormality be characterized by sudden impulse as opposed to brooding and reflection, it is more appropriate to term it a "control" or "volitional" test.

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[4] Clark & F. 200, 8 Eng. Rep. 718 (House of Lords, 1843).

A third stage was the repudiation of both *M'Naghten* and its volitional supplement by the famous decision of *Durham* v. *United States.*[6] There, the court enunciated the formulation: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[7] The court did not define the terms of the new rule in that decision. After numerous appellate opinions, refining, clarifying, expanding, and limiting *Durham* over a period of eighteen years, the District of Columbia circuit overruled it in *United States* v. *Brawner.*[8]

Meanwhile, the other Federal courts of appeals, with some modifications and hesitations, had moved from *M'Naghten* and its volitional modification to the proposal of the American Law Institute's Model Penal Code, which provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of law."[9] Adoption of the A.L.I. formulation marks the fourth and latest stage of development of Federal decisional law on the subject, although minor differences among the circuits continue to exist.[10] In the *Brawner* case, *supra,* the District of Columbia Circuit joined the other circuits in embracing this approach.

b. Burden of proof

Under current Federal law, once the defendant raises the issue of insanity, the government has the burden of disproving the defense beyond a reasonable doubt—i.e., the government must prove by the standard indicated that the defendant was able, insofar as his mental health was concerned, to distinguish right from wrong and had the capacity to control his criminal behavior. This rule stems from the nineteenth century case of *Davis* v. *United States.*[11] The rule has been held in *Leland* v. *Oregon* to establish "no constitutional doctrine, but only the rule to be followed in Federal courts."[12] In *Leland,* the court rejected a challenge under the due process clause to a State rule that required the defendant to prove insanity beyond a reasonable doubt. *Leland* was reaffirmed by the Supreme Court in *Patterson* v. *New York,*[13] which sustained a different affirmative defense, in part by noting the analogy to the insanity defense issue resolved in *Leland*. Most recently, in *Jones* v. *United States,*[14] the Supreme Court, citing *Leland*, observed that a defendant could be required to prove his insanity by a higher standard than a preponderance of the evidence. Thus, it is clear that the question of which party—the government or the defendant—should bear the burden of proof on the insanity defense, as well as the appropriate standard, are not of constitutional dimensions beyond the power of Congress to legislate.

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[5] See *Davis* v. *United States,* 165 U.S. 373, 378 (1897).

[6] 214 F.2d 862 (D.C. Cir. 1954).

[7] *Id.* at 874.

[8] 471 F.2d 969 (D.C. Cir. 1972). See generally *Symposium on United States* v. *Brawner,* 1973 Wash. U.L.Q. 17–54.

[9] Model Penal Code, § 4.01 (P.O.D. 1962).

[10] The positions of the various circuits are surveyed in *United States.* v. *Brawner, supra* note 8 at 979–981. The most notable departure from uniformity is the Third Circuit, where the court has eliminated the cognitive aspect of the A.L.I. test. See *United States* v. *Currens,* 290 F.2d 751 (3d Cir. 1961); cf. *Government of Virgin Islands* v. *Bellott,* 495 F.2d 1393 (3d Cir. 1974).

[11] 160 U.S. 469 (1895). In *Davis* the court was principally concerned with the trial judge's instruction that seemed to place on the defendant charged with murder the burden of disproving that he acted with malice aforethought.

[12] 343 U.S. 790, 797 (1952).

[13] 432 U.S. 197 (1977).

C. The scope of expert testimony

Under current law, the scope of expert testimony by psychiatrists or other mental health experts is governed by the cryptic disclaimer that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[15] Thus, the expert witness may testify about so-called "ultimate" issues, such as whether or not the defendant was in his opinion "insane," "sane," lacked the capacity to distinguish "right from wrong," or lacked the capacity to "conform his behavior to the requirement of law," as well as about the defendant's mental illness, psychiatric diagnosis, and related clinical conditions.

2. Provisions of the bill, as reported

Section 401 of the bill provide that title IV may be cited as the "Insanity Defense Reform Act of 1983."

Section 402 adds a new section 20 to title 18 of the United States Code to define the scope of the insanity defense for Federal offenses and to shift the burden of proof to the defendant. In its entirety the new section would provide:

> **§ 20. Insanity defense**
>
> (a) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) BURDEN OF PROOF.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

The principal difference between the statement of the defense in S. 1762 and that presently employed in the Federal courts is that the volitional portion of the cognitive-volitional test of the ALI Model Penal Code is eliminated. The Committee, after extensive hearings,[16] concluded that it was appropriate to eliminate the volitional portion of the test.

While there has been criticism of the "right-wrong" *M'Naghten* test, the "irresistible impulse" part of the current Federal insanity defense has received particularly strong criticism in recent years.[17] Conceptually, there is some appeal to a defense predicated on lack of power to avoid criminal conduct. If one conceives the major purpose of the insanity defense to be the exclusion of the nondeterrables from criminal responsibility, a control test seems designed to meet that objective. Furthermore, notions of retributive punishment seem particularly inappropriate with respect to one powerless to do otherwise than he did.

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[14] — U.S. — (decided June 29, 1983) (slip opinion).

[15] Rule 704, Federal Rules of Evidence.

[16] See hearing on the insanity defense, supra note 2.

A stong criticism of the control test, however, is associated with a determinism which seems dominant in the thinking of many expert witnesses. As noted by David Robinson of George Washington University, "[m]odern psychiatry has tended to view man as controlled by antecedent hereditary and environmental factors." [18] Freud once wrote, for example: [19]

> I have already taken the liberty of pointing out to you that there is within you a deeply rooted belief in psychic freedom and choice, that this belief is quite unscientific, and that it must give ground before the claims of determinism which governs even mental life.

In their widely recognized text,[20] Doctors Frederick C. Redlich and Daniel X. Freedman, the Dean of the Yale Medical School and Chairman of the Psychiatry Department, University of Chicago, respectively, stated:

> As a technology based on the behavioral and biological sciences, psychiatry takes a deterministic point of view. This does not mean that all phenomena, in our field can be explained, or that there is no uncertainty. It merely commits us to a scientific search for reliable and significant relationships. We assume causation—by which we mean that a *range* of similar antecedents in *both* the organism and environment produces a similar *set* of consequences.

Such a view is consistent with a conclusion that *all* criminal conduct is evidence of lack of power to conform behavior to the requirements of law. The control tests and volitional standards thus acutely raise the problem of what is *meant* by lack of power to avoid conduct or to conform to the requirements of law which leads to the most fundamental objection to the control tests—their lack of determinate meaning.

Richard J. Bonnie, Professor of Law and Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, while accepting the moral predicate for a control test, explained the fundamental difficulty involved: [21]

> Unfortunately, however, there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity. There is, in

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[17] See generally, hearings *supra* note 2; S. Rept. No. 97-307, *supra* note 1 at 96-108.

[18] Hearings, The Insanity Defense, *supra* note 2 at 73.

[19] Introductory Lectures of Psychoanalysis, pp. 86-88 (1923).

[20] The Theory and Practice of Psychiatry, p. 79 (1966).

[21] Hearings, The Insanity Defense, *supra* note 2 at 276-277.

> short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. Whatever the precise terms of the volitional test, the question is unanswerable—or can be answered only by "moral guesses." To ask it at all, in my opinion, invites fabricated claims, undermines equal administration of the penal law, and compromises its deterrent effect.

Professor Robinson states the same idea as follows: [22]

> No test is available to distinguish between those who cannot and those who will not conform to legal requirements. The result is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations.

Similarly, The Royal Commission on Capital Punishment stated: [23]

> Most lawyers have consistently maintained that the concept of an "irresistible" or "uncontrollable" impulse is a dangerous one, since it is impracticable to distinguish between those impulses which are the product of mental disease and those which are the product of ordinary passion, or, where mental disease exists, between impulses that may be genuinely irresistible and those which are merely not resisted.

A brief but perceptive discussion of the problem is contained in the concurring opinion of Mr. Justice Black, joined by Mr. Justice Harlan, in *Powell* v. *Texas*,[24] upholding the constitutionality of criminal penalties applied to alcoholics whose public drunkenness is alleged to be beyond volitional control:

> When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force which is nevertheless his except in some special sense. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible.
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> * * * * *
>
> [T]he question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons wish to regard as irrelevant.

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[22] *Id.* at 72.

[23] 1949–1953 Report, p. 80.

[24] 392 U.S. 514, 540, 544 (1968).

The American Psychiatric Association also has commented on the ability of expert witnesses to provide adequate information to resolve issue inherent in the current insanity test:[25]

> The above commentary [concerning the legal standards for an insanity defense] does not mean that given the present state of psychiatric knowledge psychiatrists cannot present meaningful testimony relevant to determining a defendant's understanding or appreciation of his act. Many psychiatrists, however, believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether a defendant was able to control his behavior. The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.

Finally, during the hearings on S. 829 this Congress, the American Bar Association,[26] the National Association of Attorneys General,[27] and the National District Attorneys Association[28] expressed support for narrowing the insanity defense in this fashion for essentially the reasons summarized in the preceding discussion.

The indeterminacy problem of control tests is not sufficiently mitigated by the requirements of mental disease or defect. The disease or defect requirement is present in all of the statements of insanity defenses. It is almost never defined, however. Primary reliance is conveniently placed on expert testimony, apparently because it is widely assumed, first, that there is a medical consensus on the meaning of these terms, and second, that this meaning is relevant to the legal purposes at hand. Neither assumption is entirely accurate.

As Doctors Redlich and Freedman point out:[29]

> In older texts and in current lay parlance, psychiatry is often defined as the science dealing with mental diseases and illnesses of the mind or psyche. Since these are terms reminiscent of the metaphysical concepts of soul and spirit, we prefer to speak of behavior disorder. * * * Medically recognizable diseases of the brain cannot, for the most part, be demonstrated in behavior disorders.
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> What, then, are these difficulties psychiatrists are supposed to treat, the so-called behavior disorders? Defying easy definition, the term refers to the presence of certain

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[25] American Psychiatric Association Statement on the Insanity Defense, p. 14 (as approved by the Board of Trustees) (December 1982).

[26] Crime Control Act Hearings (statement of the American Bar Association, pp. 41-48).

[27] *Id.* (statement of Leroy S. Zimmerman on behalf of the National Association of Attorneys General, p. 6). The National Association of Attorneys General also recommended the establishment of an additional verdict of guilty but mentally ill. The Committee believes that this approach, while probably constitutional in that it would not relieve the government of the burden of proving any element of the offense including any mental element, would do nothing to eliminate confusing psychiatric testimony on a wide range of issues not directly related to whether the defendant understood the nature of his acts.

[28] *Id.* (statement of President-Elect Edwin L. Miller, Jr. on behalf of the National District Attorneys Association, pp. 15-16).

[29] *The Theory and Practice of Psychiatry, supra* note 20 at 1.

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> behavior patterns * * * variously described as abnormal, subnormal, undesirable, inadequate, inappropriate, maladaptive or maladjusted—that are not compatible with the norms and expectations of the patient's social and cultural system.

The Committee also included language in section 20 explicitly providing that mental disease or defect other than that which renders the defendant unable to appreciate the nature and quality or wrongfulness of his acts does not constitute a defense. This is intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had a "diminished responsibility" or some similarly asserted state of mind which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony.

The provision that the mental disease or defect must be "severe" was added to section 20 as a Committee amendment. As introduced in S. 829, the provision referred only to a "mental disease or defect." The concept of severity was added to emphasize that nonpsychotic behavior disorders or neuroses such as an "inadequate personality," "immature personality," or a pattern of "antisocial tendencies" do not constitute the defense. The Committee also intends that, as has been held under present case law interpretation, the voluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, does not constitute insanity or any other species of legally valid affirmative defense.[30]

Significantly, the bill as reported shifts the burden of proof of the insanity defense to the defendant, who must demonstrate, by clear and convincing evidence, that his severe mental disease or defect caused him not to appreciate the nature and quality or wrongfulness of his acts. More than half of the States now place the burden of proving insanity on the defendant, albeit often by a preponderance of the evidence standard. As previously noted, the Supreme Court in *Jones* v. *United States* has made it clear that placing this burden of proof on the defendant under a standard of clear and convincing evidence is constitutionally permissible. The Committee agrees completely with the observations of Edwin Miller on behalf of the National District Attorneys Association: [31]

> A most vital feature of this Act is the allocation of the burden of proof of insanity to the defendant. The most widely criticized aspect of the insanity law in some jurisdictions is the impossible burden sometimes placed on the Government of proving someone's sanity beyond a reasonable doubt.

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[30] See, *e.g.*, *United States* v. *Moore*, 486 F.2d 1139 (D.C. Cir.) (en banc), cert. denied, 414 U.S. 980 (1973); see generally, *Powell* v. *Texas*, 392 U.S. 514 (1968). Of course, intoxication may negate a state of mind required for the commission of the offense charged. See the discussion of S. Rept. No. 97-307, *supra* note 1 at 108-109.

[31] *Supra* note 28 at 16-17.

> [T]he overwhelming majority of American jurisdictions recognize that the evidence of the *defense* of insanity should be produced by the defendant. * * * It is an affirmative defense to legal and moral responsibility. It says, "even if I did it, I'm not responsible." As such, it is entirely proper that the defendant have the burden of establishing non-responsibility. A defendant is required to present the evidence in all other affirmative defenses and this is particularly fitting in the case of insanity. Such evidence is peculiarly available, if at all, to the defendant. On the other hand, evidence to establish sanity—beyond any reasonable doubt—is frequently unavailable to the prosecution.
>
> I have heard judges, prosecutors and defense counsel roundly denounce the Herculean task of requiring the Government to prove anyone is not insane beyond a reasonable doubt. The single most attractive provision of this Act is to fairly require the accused to prove his sanity by the lesser standard of clear and convincing evidence.

The standard of proof—clear and convincing evidence—is, of course, a higher standard than a mere preponderance of the evidence.[32] The Committee is of the view that a more rigorous requirement than proof by a preponderance of the evidence is necessary to assure that only those defendants who plainly satisfy the requirements of the defense are exonerated from what is otherwise culpable criminal behavior.

With respect to limitations on the scope of expert testimony by psychiatrists and other mental health experts, section 406 of title IV of the bill amends Rule 704 of the Federal Rules of Evidence to provide:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact. Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been. The basis for this limitation on expert testimony in insanity cases is ably stated by the American Psychiatric Association:[33]

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[32] See generally, *Addington* v. *Texas*, 441 U.S. 418 (1979).

[33] American Psychiatric Association Statement on the Insanity Defense, *supra* note 25 at 18–19. See also, Hearings, Limiting the Insanity Defense, *supra* note 2 at 256–258 (statement of Dr. Loren Roth, University of Pittsburgh) and 272–273 (statement of Dr. Seymour L. Halleck, University of North Carolina.

> [I]t is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist's first obligation and expertise in the courtroom is to "do psychiatry," i.e., to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. [Footnote omitted.] Juries thus find themselves listening to conclusory and seemingly contradictory psychiatric testimony that defendants are either "sane" or "insane" or that they do or do not meet the relevant legal test for insanity. This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. In fact, in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even the extent of mental disorder exhibited by the defendant at the time of the act.
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> Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert. Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.

Moreover, the rationale for precluding ultimate opinion psychiatric testimony extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven. The Committee has fashioned its Rule 704 provision to reach all such "ultimate" issues, *e.g.,* premeditation in a homicide case, or lack of predisposition in entrapment.

COMMITMENT PROCEDURES, PROCEDURES TO DETERMINE COMPETENCY AND RELATED MATTERS

INTRODUCTION

Section 403 of this title completely amends chapter 313 of title 18 of the United States Code dealing with the procedure to be followed by Federal courts with respect to offenders suffering from a mental disease or defect. However, the scope of the new chapter 313 is much more comprehensive than that of the chapter 313 in current law. Of particular importance is the provision in new section 4243 for the hospitalization of a person adjudged to be not guilty only by reason of insanity. Most of the new provisions are identical to those set out in subchapter B of Chapter 36 of S. 1630, as reported by the

Committee in the 97th Congress (S. Rept. No. 97-307). The various new provisions will be discussed individually.

SECTION 4241. DETERMINATION OF MENTAL COMPETENCY TO STAND TRIAL

1. In general

Section 4241 follows present Federal law in that it provides for a determination by the court of a defendant's competency to stand trial.

The function of the incompetency standard is twofold: first, it is fundamentally unfair to convict an accused person, in effect, in absentia. This was basically the Supreme Court's position in *Pate* v. *Robinson,*[34] in terms of the due process clause of the Fourteenth Amendment. Second, the accuracy of the factual determination of guilt becomes suspect when the accused lacks the effective opportunity to challenge it by his active involvement at the trial.

2. Present Federal law

Competency to stand trial in Federal courts is governed by chapter 313 of title 18,[35] which constitutes part of comprehensive legislation enacted in 1949 "to provide for the care and custody of insane persons charged with or convicted of offenses against the United States." [36] The chapter was proposed by the Judicial Conference of the United States "after long study by a conspicuously able committee, followed by consultation with Federal district and circuit judges." [37]

18 U.S.C. 4244 deals with the procedure to be followed by the court in determining the mental competency of a defendant after arrest and prior to the imposition of sentence or prior to the expiration of a period of probation. Upon motion by the government or the defendant, or on its own motion, the court is required to order that the defendant be examined by at least one psychiatrist. If the psychiatrist's report indicates mental incompetency, the court must then hold a hearing and make a finding with respect to the defendant's competency.

The statute does not state an explicit test for the presence or absence of mental competency to stand trial, although the statute does state that the question at issue in having the defendant examined by a psychiatrist is to determine whether the accused is "presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense." The leading decision on the question of the test to be applied is *Dusky* v. *United States.*[38] There the Court reversed a conviction after the government admitted that the trial court had erred in finding competency on the basis of the record before it. In a very brief, per curiam opinion, the Supreme Court stated: [39]

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[34] 383 U.S. 375 (1966).

[35] 8 U.S.C. 4241–4248

[36] Act of Sept. 7, 1949, ch. 535, BB1, 63 Stat. 686.

[37] *Greenwood* v. *United States*, 350 U.S. 366, 373 (1966).

[38] 362 U.S. 402 (1960).

[39] *Ibid.*

> We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that "the defendant (is) oriented to time and place and (has) some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him."

18 U.S.C. 4245 sets forth the procedure to be followed whenever there is probable cause to believe that a person convicted of an offense was mentally incompetent at the time of his trial, but where the issue of mental competency was not raised or determined before or during the trial. If the court finds that the person was mentally incompetent at the time of his trial, the court must vacate the judgment of conviction and grant a new trial.

18 U.S.C. 4246 provides for the commitment of a defendant found mentally incompetent under section 4244 or 4245. The commitment is to the custody of the Attorney General until the defendant is competent to stand trial or until the pending charges against him are disposed of according to law.

3. Provisions of the bill, as reported

Section 4241 contains six subsections which deal exclusively with the determination of the mental competency of the defendant to stand trial. This section tracks, with some modifications, sections 4244, 4245, and 4246 of title 18 as they now exist. It is intended that the procedures for determining the mental competency of the defendant to stand trial are also to apply to the issue of the defendant's competency to enter a plea.

Section 4241(a) permits a motion to determine the mental competency of the defendant to stand trial to be filed by the government or by the defendant after the defendant has been arrested or charged and before the imposition of sentence on the defendant. The court must order a hearing upon its own motion, or on the motion of the government or the defense, if there is reasonable cause to believe that the defendant is presently incompetent to stand trial. Such reasonable cause exists if the court believes that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or assist properly in his defense.[40]

Section 4241(a) substantially follows 18 U.S.C. 4244 in that the motion for a competency hearing may be filed by the government or by the defendant; in addition the court may act *sua sponte.* Under section 4241(a) there is no specific requirement, as in 18 U.S.C. 4244, that the motion set forth the grounds for the belief that the defendant is incompetent to stand trial; however, this requirement is incorporated into the statute by Rule 47 of the Federal Rules of Criminal Procedure which provides that all motions to the court must state the grounds upon which they are made.[41] Of course, pursuant to that rule, the motion may be made orally,[42] but grounds for the motion must still be stated.

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[40] The Committee intends to perpetuate current law to the effect that neither amnesia nor the use of narcotics *per se* renders an accused incompetent to stand trial. See e.g., *United States* v. *Borum,* 464 F.2d 896 (10th Cir. 1972); *United States* v. *Williams,* 468 F.2d 819 (5th Cir. 1972).

The motion may be made only after the commencement of a prosecution against the defendant and prior to the imposition of sentence on the defendant. Under 18 U.S.C. 4244, the motion could only be made after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation.[43] Referring to the commencement of a prosecution, section 4241(a) permits the procedure to be set in motion at the earliest of the date of the actual arrest or of the date of the filing of an information or the return of an indictment, thus preserving the current case law interpretation. In the view of the Committee, it would be improper for the attorney for the government to use a motion under this section to obtain undue leverage in plea bargaining by filing the motion and then initiating plea negotiations during the commitment, although he could properly participate in plea bargaining initiated by the defendant. The intention of the Committee is that a prosecutor should not use such a motion and then initiating plea negotiations during the commitment. The Committee has eliminated the provision on filing a motion during a period of probation as anomalous in light of the fact that probation is treated in new section 3551 of title 18—added by title II of this bill—as a sentence rather than as a suspension of the imposition or execution of sentence and because Rule 33 of the Federal Rules of Criminal Procedure allows the defendant to move for a new trial based upon newly discovered evidence within two years after final judgment. Evidence that the defendant was incompetent at the time of trial most likely would be newly discovered evidence. In addition, the defendant may file a motion under 28 U.S.C. 2255 at any time.[44]

18 U.S.C. 4244 provides that the court is to hold a hearing if the report of the examining psychiatrist indicates a state of mental incompetency in the defendant. Section 4241(a) gives the court discretion to order a competency hearing to determine the mental competency of the defendant on its own motion or on the motion of the government or the defense. Moreover, it is mandatory that the court order a hearing if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Thus, unlike present Federal law, section 4241(a) permits the court to order that

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[41] See *United States* v. *Becera Soto*, 387 F.2d 792 (7th Cir. 1967), cert. denied, 391 U.S. 928 (1968); *Krupnick* v. *United States*, 264 F.2d 213 (8th Cir. 1959).

[42] See *United States* v. *Irvin*, 450 F.2d 968 (9th Cir. 1971); *United States* v. *Burgin*, 440 F.2d 1092 (4th Cir. 1971).

[43] This period has been judicially construed to include the time after arrest and before the defendant is indicted. *United States* v. *Adams*, 296 F. Supp. 1150 (S.D. N.Y. 1969); or arraigned, *Arco* v. *Ciccone*, 359 F.2d 796 (8th Cir. 1966); on the day of trial, *Mitchell* v. *United States*, 316 F.2d 354 (D.C. Cir. 1963); and after trial. *United States* v. *Lawrenson*, 210 F. Supp. 422 (D. Md. 1962), aff'd. 315 F.2d 612 (4th Cir.), cert. denied, 373 U.S. 938 (1963).

[44] See *Hanson* v. *United States*, 406 F.2d 199 (9th Cir. 1969). Moreover, the section 2255 motion obviates the necessity to include a section similar to 18 U.S.C. 4245 which sets out the procedure to be followed when the Director of the Bureau of Prisons finds that a prisoner was incompetent at trial. Thus, the defendant may file a section 2255 motion based upon his incompetency at trial, and the government is under a continuing duty to notify the court of such information.

a hearing be held prior to a psychiatric or psychological examination if the requisite finding can be made. However, the Committee contemplates that a psychiatric examination will be routine in virtually all cases in which the court is required to hold a hearing, and although discretion to hold the hearing without a psychiatric examination is provided, the court may not abuse this discretion and refuse to order an examination where the facts warrant an examination.[45]

Subsection (b) of section 4241 provides that the court may order that a psychiatric or psychological examination be conducted and that a psychiatric or psychological report be filed, pursuant to section 4247 (b) and (c). Under section 4247(b), the court may order that an examination be conducted by a licensed or certified psychiatrist or by a clinical psychologist, or by additional examiners if the court finds it would be appropriate in a particular case.

For the purpose of the examination, the court is empowered to commit the defendant, for a period of not more than thirty days, to the custody of the Attorney General who must place the defendant in a suitable facility. The director of the facility may apply to the court for an extension of time up to fifteen days. If the defendant is committed, the examination shall be conducted, unless impracticable, in the suitable facility closest to the court. If, however, the court believes that the defendant's examination can be conducted on an outpatient basis, there need not be a commitment under this provision. In the unusual case where the person was inadvertently detained beyond the period authorized by this subsection, habeas corpus would be available. Even if this occurred, however, since the examination, and in fact all the procedures included in this section, are for the benefit of the defendant,[46] as well as for the benefit of society, the report of a psychiatric examination of a defendant would be admissible on the question of competency to stand trial.

Section 4247(c) requires the psychiatric or psychological examiner to file with the court a report that includes (1) the defendant's history and present symptoms; (2) a description of the tests employed and their results; (3) the examiner's findings; and (4) the examiner's opinions as to diagnosis and prognosis, and whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Copies of this report must also be sent to the counsel for the defendant and the attorney for the government.[47]

Although the examiner is required pursuant to section 4247(b) to examine the defendant, the Committee is aware that the examiner may decide that is is unnecessary to administer tests to the defendant in a particular case. The absence of tests will not invalidate the examiner's report to the court and is not a basis for an objection to the report that is filed if the reporting examiner has indeed examined the defendant and studied the data, if any, gathered from tests and the reports made by others.

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[45] See *United States* v. *Cook*, 418 F.2d 321 (9th Cir. 1969).

[46] It has been held that it is a denial of due process to try a defendant who is mentally incompetent to stand trial. See *Pate* v. *Robinson*, *supra* note 34; *United States* v. *Horowitz*, 360 F. Supp. 772 (E.D. Pa. 1973).

[47] Throughout the chapter, references are made to reports being sent to the counsel for the defendant (rather than to the defendant) in order that counsel may determine whether in his judgment it is appropriate or useful for the defendant to see the report, recognizing that this may be inadvisable in some cases.

Section 4241(c) provides that the hearing shall be conducted pursuant to section 4247(d), which requires that the hearing fully comport with the requirements of due process. Included in the protections afforded by the subsection for the hearing are the right to counsel (court appointed if the defendant is indigent), the right to testify and to present evidence, the opportunity to confront and cross-examine witnesses as well as the right to present witnesses in his own behalf.

Subsection (d) of section 4241 provides that the court must make a determination with respect to the defendant's competency based upon a preponderance of the evidence. It should be noted that the question of competency of a defendant is for the court to determine and is not to be tried before a jury. This is in accord with present Federal law.[48]

The finding that the court must make is whether the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. This test of competency, in essence, adopts the standards set forth by the Supreme Court in *Dusky* v. *United States.*[49]

If the court makes a finding of incompetency, it must then commit the defendant to the custody of the Attorney General, who is required to hospitalize the defendant for treatment in a suitable facility.[50] For example, the Attorney General might conclude that a wing of a prison set aside for treatment of offenders with mental illness could be suitable for a defendant charged with a serious crime of violence. In accord with the Supreme Court's holding in *Jackson* v. *Indiana,*[51] commitment under section 4241 may only be for a reasonable period of time necessary to determine if there exists a substantial probability that the person will attain the capacity to permit the trial to go forward in the foreseeable future. Under section 4241(d)(1) the period may not exceed four months, however. If a determination is made that there is a substantial probability the person can attain the capacity within an additional reasonable period of time, the commitment can continue for such additional reasonable period of time until his mental condition improves to the extent that the trial can proceed or until all charges against him are dropped, whichever is earlier. If, at, or before the end of the four-month period or the extension, it is determined that the defendant's mental condition will not so improve or has not so improved as to permit the trial to proceed, the defendant is made subject to the provisions of section 4246 dealing with hospitalization of a person due for release but suffering from a mental disease or defect.[52]

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[48] See *United States* v. *Huff,* 409 F.2d 1225 (5th Cir.), cert. denied, 396 U.S. 857 (1969); *United States* v. *Davis,* 365 F.2d 251 (6th Cir. 1965).

[49] *Supra* note 38.

[50] Pursuant to section 4247(j) the Attorney General is authorized to contract for non-Federal facilities in order to hospitalize the defendant.

[51] 406 U.S. 715 (1972).

This commitment procedure is very similar to current Federal law [53] which has been held constitutional by several courts.[54] In addition, commitment of an incompetent defendant under provisions such as those contained in section 4241 has been held to be not unconstitutional as denying the defendant his right to speedy trial.[55]

Under subsection (e) of section 4241 when the head of the facility in which a defendant is hospitalized determines that the defendant has recovered to the extent that he is competent to stand trial, he must file a certificate so stating with the clerk of the committing court. The clerk must then send copies of the certificate to the defendant's counsel and to the attorney for the government. Upon receipt of the certificate, the court is required to order a hearing to determine the present competency of the defendant. The hearing must follow the due process requirements of section 4247(d).

If the court finds by a preponderance of the evidence adduced at the hearing that the defendant has recovered to the extent that he is competent to stand trial, the court must order the release of the defendant from the facility in which he is hospitalized and set a date for the trial of the defendant or for the next stage in the criminal proceeding against the defendant. A defendant ordered released after a hearing pursuant to this subsection is subject to the pretrial release provisions of chapter 207.

Section 4247(e)(1) requires the director of the facility in which the defendant is hospitalized to submit semiannual reports to the committing court concerning the mental condition of the defendant and recommendations concerning his continued hospitalization. The head of the facility must also send copies of the report to such other persons as the court may direct.

This procedure requiring semiannual reports is consistent with Federal case law. In *In re Harmon,*[56] the First Circuit stated that if a defendant is committed to the custody of the Attorney General pursuant to 18 U.S.C. 4246, the district court should require frequent reports on the accused's mental condition at stated intervals.

There may be some question as to the duty and authority of a court which receives a report stating that the defendant is presently competent to stand trial. The Committee intends that whenever a court receives such a report submitted pursuant to this subsection, the court is to treat the report as a certification filed pursuant to section 4241(e). Accordingly, the court must order a hearing on the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the proceedings against him and to assist properly in his defense, the court must order the release of the defendant from the facility in which he is hospitalized, determine whether he should be released or detained pursuant to chapter 207 pending trial, and set the date for trial of the defendant.

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[52] If all charges against a presently mentally defective defendant are dropped, the head of the facility in which the defendant is hospitalized may notify State authorities of the defendant's condition so that State authorities may determine if civil commitment proceedings are warranted. If State authorities cannot or will not arrange for the commitment of the defendant, Federal proceedings under section 4245 may be instituted if the reason for dropping the charges was related solely to the mental condition of the defendant. If the charges were dropped for other reasons, such as inadequate evidence to prove an offense, the Federal Government has no further interest in the case and cannot seek to civilly commit the defendant even if the State chooses not to proceed.

[53] 18 U.S.C. 4246.

[54] *Greenwood* v. *United States, supra* note 37; *Kirkwood* v. *Harris,* 229 F. Supp. 904 (W. D. Mo. 1964); *Tiemter* v. *Harris,* 222 F. Supp. 920 (W. D. Mo. 1963).

[55] *United States* v. *Davis, supra* note 48; *United States* v. *Miller,* 131 F. Supp. 88 (D. Vt. 1955).

[56] 425 F.2d 916 (1st Cir. 1970).

Section 4247(g) codifies the provision in 18 U.S.C. 4244 by making any statement made by the defendant during the course of a psychiatric or psychological examination pursuant to section 4241 (or 4242 dealing with examinations concerning sanity at the time of the offense), inadmissible on the issue of whether the defendant engaged in the conduct that constitutes the offense charged.[57] It also makes any such statement inadmissible on the question of punishment in accordance with *Estelle* v. *Smith,*[58] which held that self-incrimination protection can extend to the sentencing phase of trial. Section 4247(g) is intended to be consistent with Rule 12.2(c) of the Federal Rules of Criminal Procedure which took effect on August 1, 1983, and provides in relevant part: "No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceedings except on an issue respecting mental condition on which the defendant has introduced testimony."

Section 4241(f) makes it clear that a finding by the court as to the competency of the defendant to stand trial is not to prejudice the defendant on the separate issue of whether he was insane at the time of the offense. Moreover, the finding itself as to the defendant's competency is specifically made inadmissible at the trial for the underlying offense charged. This rule of evidence is similar to the limitations present in 18 U.S.C. 4244.

SECTION 4242. DETERMINATION OF THE EXISTENCE OF INSANITY AT THE TIME OF THE OFFENSE

1. In general

Section 4242 provides for psychiatric or psychological examination of the defendant when a defendant files a notice of intent to rely upon the defense of insanity at the time of the offense. The section also provides for the special verdict of not guilty only by reason of insanity required if the defendant uses such notice.

2. Present law

Present Federal law, other than the District of Columbia Code, contains no provision for a verdict or finding of not guilty by reason of insanity.[59] The concept of a notice of an intent to raise an insanity defense was first suggested by a 1974 amendment to the Federal Rules of Criminal Procedure.[60] Furthermore, there is no procedure for commitment to a mental institution of a person who obtains an acquittal on the basis of the insanity defense—if the basis of the acquittal can even be determined with certainty.[61] Federal officials must attempt civil commitment of such persons by urging local authorities to institute commitment proceedings. Frequently such efforts are unsuccessful; not uncommonly this is due to lack of sufficient contacts between the acquitted defendant and a particular State for the latter to be willing to undertake care and treatment responsibility for him.[62] The absence of post-acquittal arrangements for commitment is in marked contrast with procedures presently provided by chapter 313 of title 18, United States Code, for Federal commitment of a person found incompetent to stand trial and convicted prisoners who subsequently become mentally ill.[63]

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[57] See *United States* v. *Malcolm,* 475 F.2d 420 (9th Cir. 1973), and cases cited therein.

[58] 451 U.S. 454 (1981).

[59] However, the giving of an instruction permitting the jury to return a not-guilty-by-reason-of-insanity verdict is not necessarily reversible error. See *United States* v. *McCracken,* 488 F.2d 406, 418–421 (5th Cir. 1974).

3. Provisions of the bill, as reported

Section 4242(a) must be read in conjunction with Rule 12.2 of the Federal Rule of Criminal Procedure.[64] The rule provides that if a defendant intends to rely upon the defense of insanity at the time of the alleged offense, he must notify the attorney for the government and file a copy of the notice with the clerk of the court. Upon motion of the attorney for the government, the court may order the defendant to submit to a psychiatric examination as provided in this section.

Accordingly, subsection (a) provides that after the filing by the defendant of a Rule 12.2 notice, and upon motion of the attorney for the government, the court must order that the defendant be examined under the provisions of section 4247(b). The examination is triggered by the government motion since it is the government which would dispute the insanity defense and would want an independent psychiatric evaluation of the defendant. If no such motion is made by the government, there is no requirement that the court order an examination; however, under its inherent power, the court, in an appropriate case, may order the examination.[65]

Under section 4247(b), for the purpose of the examination the court may order that the defendant be committed for a period of not longer than forty-five days, with an opportunity for a thirty-day extension upon application of the director of the facility to the court for good cause shown.

Section 4247(c) requires the examiner or examiners conducting an examination pursuant to section 4242 to file a report with the court and to send copies of the report to the counsel for the defendant and the attorney for the government, as is required for examinations pursuant to section 4241. Section 4247(c) requires the same first three items in the report for an examination pursuant to section 4242 as are required for section 4241. The fourth required item is different, reflecting the different procedure involved in section 4242. Here the examiners must present their opinions as to diagnosis and prognosis, and as to whether the defendant was insane at the time of the offense charged.[66]

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[60] Rule 12.2.

[61] The subject is well canvassed in *United States* v. *McCracken, supra* note 59, at 415–425, which noted that: "Time and again federal courts have decried this gaping statutory hole * * * and have called upon Congress to take remedial action."

[62] See Tydings, *Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure*, 27 Md. L. Rev. 131, 133 (1968).

[63] See 18 U.S.C. 4241–4248.

[64] Section 404 of the bill, as reported contains technical amendments to Rule 12.2.

[65] See *United States* v. *Malcolm, supra* note 57.

As heretofore stated, the Federal law generally contains no provision for a verdict of not guilty by reason of insanity.[67] To cure the problems that this lack creates, section 4242(b) provides that where the issue of insanity is raised, the jury is to be instructed to find, or, in the event of a non-jury trial, the court is to find, the defendant either (1) guilty; (2) not guilty; or (3) not guilty only by reason of insanity.

The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity.[68] If the defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not.[69]

In augmentation of the Fifth Amendment privilege against self-incrimination and in accordance with present Federal practice,[70] section 4247(g) prohibits the admission into evidence on the issue of guilt of statements made by the defendant during the course of a psychiatric examination pursuant to section 4242 on the issue of guilt. Of course, since the exclusion is for the defendant's benefit, he may waive it.[71] The provision also makes the defendant's statements inadmissible on issues of punishment.[72]

SECTION 4243. HOSPITALIZATION OF A PERSON FOUND NOT GUILTY ONLY BY REASON OF INSANITY

1. In general

Section 4243 sets out the procedure to be followed when a person is found not guilty solely by reason of insanity at the time of the offense. Included is a commitment provision whereby a person acquitted only by reason of insanity, who is presently suffering from mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, will be committed for treatment to the custody of the Attorney General.

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[66] While the opinion of the psychiatrist or psychologist may be in his report, his opinion on the question of the defendant's sanity may not be imparted to the trier of fact in accordance with the provision of section 406 of this bill.

[67] It should be noted that the District of Columbia Code, section 24-301(c), provides that the jury must state in its verdict if acquittal was solely on the grounds that the defendant was insane at the time of the commission of the offense. See also Criminal Jury Instructions for the District of Columbia, Instructions 5.07 and 5.11 (1972).

[68] See also *United States* v. *McCracken*, *supra* note 59 at 418–421. Compare Instruction 5.11 of the Criminal Jury Instructions for the District of Columbia (1972), which states: "If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether the defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness."

[69] *United States* v. *Brawner*, *supra* note 8.

[70] See *United States* v. *Malcolm*, *supra* note 57.

[71] *Ibid.*

[72] See *Estelle* v. *Smith*, *supra* note 58.

2. Present Federal law

At present, there is no Federal procedure for commitment to mental institutions of persons who are acquitted solely by reason of insanity and who are presently dangerous.[73] Federal officials can obtain civil commitment of such persons only by urging local authorities to institute such proceedings. As noted above, such efforts are rarely successful largely due to a lack of sufficient contacts between the acquitted defendant and the individual State for the latter to be willing to undertake responsibility for him. The absence of post-acquittal arrangements for commitment is in marked contrast with procedures presently provided by chapter 313 of title 18, United States Code, for Federal commitment of persons found incompetent to stand trial and convicted prisoners who subsequently become mentally ill.[74]

3. Provisions of the bill, as reported

Section 4243 contains seven subsections which deal with the hospitalization of a person acquitted by reason of insanity. Subsection 4243(a) provides that when a person is found not guilty only by reason of insanity at the time of the offense charged, he must be committed to a suitable facility until he is eligible for release pursuant to subsection (e).

Subsection (b) of section 4243 provides that, in connection with a hearing held pursuant to subsection (c), the court shall order that the acquitted person be examined in accordance with sections 4247 (b) and (c) which provide for examination by a qualified psychiatrist or psychologist designated by the court. The procedure to be followed is essentially the same as that for examinations pursuant to sections 4241 and 4242.

Subsection (c) provides that, within forty days of the special verdict, a hearing is to be conducted pursuant to the provisions of section 4247(d). It will frequently be desirable to appoint the same individual or individuals who examined the acquitted person for purposes of the insanity defense to examine the person under this subsection. Nevertheless, there may be situations where a valid reason will exist for not appointing the same psychiatrist or clinical psychologist. This is left to the discretion of the court.

The requirements of subsections (a) through (c) are similar to the most recent pronouncement of Congress in this area, the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970.[75] Under this Act, a person acquitted by reason of insanity in the District of Columbia is subject to mandatory commitment to a mental hospital with a hearing to be held within fifty days of the confinement to determine whether the person is entitled to release from custody. The decision of the court must be made within ten days of the beginning of the hearing.[76]

For the purpose of the examination under section 4247(c), commitment with an opportunity for a thirty-day extension for good cause shown, may be ordered as is the case under the preceding section. Of course, if the court believes that the examination can be conducted on an outpatient basis, it need not order commitment for the examination. In addition, the court may make any order reasonably necessary to secure the appearance of the person at the hearing. This may include incarceration or continued hospitalization after completion of the psychiatric examination.

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[73] The District of Columbia Code (1973), section 24-30(d), provides for the automatic commitment of a person acquitted by reason of insanity.

[74] See 18 U.S.C. 4241-4248.

[75] Public Law 91-358, 84 Stat. 59.

[76] D.C. Code, section 24-301(d).

Section 4247(c) requires the examining psychiatrist or clinical psychologist to file a report with the court and to send copies of the report to counsel for the defendant and to the attorney for the government. Since in this case the person has already been acquitted and since the hearing must be held within forty days of the special verdict, the court will need the report in a relatively short period of time. In addition, the Committee contemplates that the hearing provided for in section 4247(c) should be held promptly after the reports are filed.

The report of the examiner or team must include (1) the acquitted person's history and present symptoms; (2) a description of the psychological and medical tests employed and their results; (3) the examiner's findings; and (4) the examiner's opinion as to diagnosis, prognosis, and whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury or serious damage to the property of another.[77] The first three items are identical to those required for an examination ordered under section 4241 or 4242. The fourth is somewhat different, reflecting the difference in the procedure involved.

Subsection (d) of section 4243 sets out the burden of proof at the commitment hearing called for in subsection 4243(c). If the person has been found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of another person, or involving a substantial risk of such injury or damage[78] he has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage to the property of another. For less serious offenses not involving bodily injury, serious property damage, or the substantial risk thereof, the acquitted person still has the burden of proof that his release will not create a substantial risk of bodily injury to another person or property damage, but the standard of proof is only by a preponderance of the evidence.

Placing the burden of proof on the acquitted person is the procedure in effect in the District of Columbia and was recently upheld by the Supreme Court in *Jones* v. *United States*.[79] In *Jones* the defendant was acquitted by reason of insanity of the offense of attempted shoplifting and the Court upheld the D.C. Code provision which required the defendant to demonstrate by a preponderance of the evidence at the commitment hearing that he was no longer mentally ill or dangerous. The Court noted that the automatic commitment procedure in the District of Columbia and the resultant shifting of the burden of proof to the defendant to show that he is no longer insane or dangerous as a prerequisite for obtaining his release arose only after the insanity acquittee himself successfully raised an insanity defense and proved by a preponderance of the evidence that he was insane. The Court therefore distinguished *Addington* v. *Texas,*[80] which held that for the involuntary civil commitment of a person the government must show insanity and dangerousness by clear and convincing evidence, and held that an insanity acquittee could be required to shoulder the burden of proof at the commitment hearing.[81] Moreover, the Court in *Jones* noted that the defendant could be required to prove his insanity at the trial by a higher standard than a mere preponderance of the evidence.[82] For example, he could be required to prove his insanity by clear and convincing evidence, which in turn would justify requiring him at the commitment hearing to prove his present sanity or lack of dangerousness by such a higher standard. Since this bill requires the defendant to prove his insanity as a defense to the criminal charge by clear and convincing evidence, it is clearly constitutional to require those defendants acquitted of violent crimes to prove that they are no longer dangerous or insane by a similar standard.

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[77] The Committee has intentionally included risk of serious damage to the property of another as part of the criteria for insanity under this section. Clearly, danger to the public from a person who is insane need not be limited to the risk of physical injury to another person. *Jones* v. *United States, supra* note 14.

[78] The Committee intends that crimes such as burglary or unarmed robbery with their likelihood to provoke violence and bodily injury be included in the "substantial risk" category.

[79] *Supra,* note 14.

Subsection (e) provides that if, after the hearing, the court makes the necessary finding of present insanity and substantial risk, it must commit the person to the custody of the Attorney General, who in turn must release the person to the appropriate State official in the person's State of domicile or the State in which the person was tried if the State will assume responsibility for the person's custody, care, and treatment. The Attorney General must make all reasonable efforts to cause such a State to assume such responsibility. If, nevertheless, neither State will do so, the Attorney General must hospitalize the person in a suitable facility. The commitment will be until either the State assumes responsibility or until the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to the property of another,[83] whichever is earlier. The Attorney General is directed to continue periodically to exert all reasonable efforts to cause an appropriate State to assume responsibility for the person's custody, care, and treatment. This commitment procedure not only affords assistance to those requiring the benefit of treatment, but also affords the public protection from those who, due to mental disease or defect, pose a danger to the rest of society.[84]

Under subsection (f), when the director of the facility in which an acquitted person is hospitalized determines that the person has recovered to the extent that his release, or his conditional release under a prescribed regimen of medical care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to the property of another, he shall promptly file a certificate so stating with the clerk of the committing court. The clerk shall send a copy of the certificate to the attorney for the government and the attorney for the committed person. Upon receipt of the certificate, the court must either order the release of the person, or upon motion of the government, or upon its own motion, hold a hearing to determine whether the person should be released. The hearing must follow the procedural requirements of section 4247(d). After the hearing, if the court finds by the standard specified in subsection (d) that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another, the court must order the immediate release of the person. If the person does not meet the criteria for unconditional release but the court finds that the person has recovered from his mental disease or defect to such an extent that his conditional release under a prescribed regimen of medical care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be discharged under an appropriate prescribed regimen of medical care or treatment on the explicit condition that he comply with the prescribed regimen. The court at any time may, after a hearing, modify or eliminate the regimen of medical care or treatment employing the same criteria applicable to the original determination.

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[80] *Supra*, note 32.

[81] See *Jones* v. *United States*, *supra* note 14 at 12-13 (slip op.).

[82] *Ibid.*

[83] This test is similar to that in 24 D.C. Code 301(e) ("will not in the reasonable future be dangerous to himself or others"). See *United States* v. *Ecker*, 543 F.2d 178 (D.C. Cir. 1976).

[84] *Ibid.*

Subsection (g) provides a procedure for dealing with the situation in which the released person fails to comply with the prescribed regimen of medical care or treatment. Under this procedure the director of the medical facility responsible for administering the regimen imposed under subsection (f) shall notify the Attorney General and the court having jurisdiction over the case of the failure to comply with the prescribed regimen. In a procedure similar to revocation of probation, upon notice by the medical director or other probable cause to believe the person has failed to comply with the regimen, the person may be arrested, and, upon arrest, must be brought without unnecessary delay before the court having jurisdiction. The court must, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

Section 4247(e)(1) requires the director of the facility in which an acquitted person is hospitalized to submit to the committing court annual reports concerning the mental condition of the person and recommendations concerning his continued hospitalization. This provision is similar to the reporting procedure for commitments pursuant to section 4241 and the comments on that section have equal applicability here.

Section 4247 states that the acquitted person committed under this section retains the right to habeas corpus relief. Thus, nothing in section 4243 should be construed as precluding an acquitted person committed under this section from establishing by writ of habeas corpus his eligibility for release under the provisions of this section.

SECTION 4244. HOSPITALIZATION OF A CONVICTED PERSON SUFFERING FROM MENTAL DISEASE OR DEFECT

1. In general

Section 4244 sets forth the procedure to be followed when there is reasonable cause to believe that a recently convicted defendant may be presently suffering from a mental disease or defect for which he needs care or treatment in a suitable facility. This section is new to Federal law and is inserted in order to assist the court in determining the proper facility for commitment of a convicted defendant. This section is also for the benefit of a convicted defendant who is mentally ill and who needs hospitalization. In addition, the hospitalization of such a person benefits society not only by protecting the public from mentally ill convicted defendants but also by treating and hopefully curing such a person.

2. Present Federal law

Present Federal law contains no provision for the hospitalization, in lieu of imprisonment in a penal facility, of a convicted person suffering from mental disease or defect.[85]

3. Provisions of the bill, as reported

Subsection (a) of section 4244 provides that, within ten days after a defendant is found guilty of an offense, the defendant or the government may file a motion for a hearing on the present mental condition of the defendant. The court must grant the motion and order a hearing if it is of the opinion that there is reasonable cause to believe that the defendant may be presently suffering from a mental disease or defect for which he needs care or treatment in a suitable facility. The motion must state the grounds upon which the motion is made; this follows the requirement set out in Rule 47 of the Federal Rules of Criminal Procedure.

In addition, the court, on its own motion, may order a hearing on the present mental condition of the defendant at any time prior to the imposition of sentence, if facts are brought to the attention of the court which would lead the court to have a reasonable belief that the defendant may be presently suffering from such a mental disease or defect. In such cases, the court must order a hearing on the mental condition of the defendant. These facts might be brought to the attention of the court if, as part of the presentence procedure, the court had ordered that the defendant be examined by a psychiatrist or by a clinical psychologist.

Subsection (b) of section 4244 provides that a convicted defendant may be examined by a psychiatrist or by a clinical psychologist pursuant to section 4247(b) which provides that the defendant may

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[85] Under 18 U.S.C. 4241, a procedure is provided for an inmate who, after he has been imprisoned, is found to be mentally ill. None exists, however, at the earlier stage contemplated by section 4244.

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be examined by an examiner or examiners designated by the court. This procedure is similar to that set forth in section 4247 for examinations pursuant to section 4241. Section 4247(c), providing for the psychiatric reports, and section 4247(d), dealing with the procedures for the hearing, also provide similar procedures to those provided for other examinations discussed earlier in relation to the preceding sections of this chapter. One distinction for section 4244 is that the examiner, among his other opinions, must report on the person's need of custody for care or treatment in a suitable facility. At this point the defendant has been convicted and the issue is the best disposition under the circumstances. This contrasts with the required opinion for section 4243, dealing with an acquitted person, where the issue posed is the person's risk of bodily injury to another person or serious damage to the property of another. If the examiner's report finds the presence of a mental disease or defect but does not find that it requires placement of the person in a suitable facility, the report should include a recommendation as to the sentencing alternatives available that will best accord the defendant the treatment he does need.

Subsection (c) provides that a hearing shall be conducted in accord with the provisions of section 4247(d), relating to due process requirements.

Subsection (d) provides that if, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court then must commit the defendant to the custody of the Attorney General for treatment in a suitable facility.

Under the subsection, commitment is to be to the custody of the Attorney General, who must hospitalize the defendant for treatment in a suitable facility. This commitment to the Attorney General shall be treated for administrative purposes as a provisional sentence to imprisonment for the maximum term authorized for the offense committed. This sentence is provisional, however, in light of the release provision set forth in subsection (e).

Under subsection (e), when the director of the facility in which the defendant is hospitalized determines that the defendant has recovered from his mental disease or defect to the extent that he is no longer in need of custody for care or treatment in such a facility he must file a certificate so stating with the clerk of the committing court. The clerk then must send copies of the certificate to the attorney for the defendant and to the attorney for the government.

Upon receipt of the certificate, if the defendant's provisional sentence imposed pursuant to subsection (d) has expired, the court need not act since the Attorney General must release the defendant. However, if the defendant's sentence has not expired, the court must order a hearing to determine whether to proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures. However, if the court is of the opinion that the defendant has not recovered to the necessary extent, the Committee intends that the court reinstitute the procedures under subsections (a) through (d) for a new determination of the defendant's mental condition, and, if necessary, the court may recommit the defendant to the custody of the Attorney General for continued hospitalization.

Section 4247(e)(1) requires the director of the facility in which the defendant is hospitalized to submit to the committing court annual reports concerning the mental condition of the defendant and recommendations concerning his continued hospitalization. This subsection parallels the similar procedure set forth in section 4247 for other sections of the chapter.

SECTION 4245. HOSPITALIZATION OF AN IMPRISONED PERSON SUFFERING FROM MENTAL DISEASE OR DEFECT

1. In general

Section 4245 deals with the hospitalization of an imprisoned person who is presently suffering from a mental disease or defect for which he is in need of custody for care or treatment. This section significantly changes 18 U.S.C. 4241 and 4242.

One major change the Committee has made in existing law is to require a court hearing before a prisoner may be transferred to a mental hospital if he objects to such a transfer. The necessity for such a hearing in State cases was made clear by the Supreme Court in *Vitek* v. *Jones* [86] which held that the involuntary transfer of a prisoner to a mental hospital implicates a liberty interest that is protected by the Fourteenth Amendment. While the Committee is in agreement with the present Federal law which permits the Attorney General to determine the appropriate method of handling Federal prisoners, as well as the appropriate place of incarceration for these prisoners, and is unaware of abuses by Federal authorities with respect to transfer of prisoners to mental hospitals, the Committee is aware of certain shocking cases involving transfer of State prisoners.[87] It is to insure that Federal prisoners continue to receive fair and just treatment that the Committee has included the protective procedures of section 4245.

Certain factors have led the Committee to the conclusion that incarceration in a suitable facility is sufficiently different from incarceration in a penal institution to require these procedural safeguards. First, although regrettable, it is a fact that there is a stigma attached to the mentally ill which is different from that attached to criminals. Thus, a prisoner transferred to a mental health facility might possibly be described as "twice cursed." [88]

Second, there are numerous restrictions and routines in a mental health facility which differ significantly from those in a prison. Since these restrictions and routines are designed to aid and protect the mentally ill, persons who do not have need for such discipline should not be subject to it.[89]

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[86] 445 U.S. 480 (1980). Since a transfer by the Bureaus of Prisons of a prisoner to a mental health facility (typically the facility at Springfield, Missouri) is not a transfer out of the system, *Vitek* is not directly applicable. See 18 U.S.C. 4082. Nevertheless before a prisoner is transferred for or otherwise ordered to undergo psychiatric treatment, a hearing is held before a neutral decisionmaker, usually a prison hospital staff member not directly involved with the prisoner's diagnoses or treatment. The Court in *Vitek* approved the use of such a person as the decisionmaker. *Id.* at 496.

[87] *E.g. United States ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969), and cases cited therein.

[88] See generally, Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Corrections of the State of New York*, 17 Buff. L. Rev. 651 (1968).

Most importantly, however, the Committee is concerned that a person mistakenly placed in a mental health facility might suffer severe emotional and psychological harm. As the Second Circuit, in a State prisoner transfer case, graphically put it: [90]

> * * * [W]e are faced with the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad but dangerously so. * * * [H]e will be exposed to physical, emotional, and general mental agony. Confined with those who are insane and indeed treated as insane, it does not take much for a man to question his own sanity and in the end to succumb to some mental aberration. * * *

Accordingly, the Committee has concluded that a prisoner's transfer to a mental health facility or prison maintained for the criminally insane cannot be handled as a mere administrative matter. In view of the substantial deprivations, hardships, and indignities such a move may produce in a sane prisoner, judicial scrutiny is necessary to insure that the procedures preceding the transfer of a prisoner who does not agree that he should be transferred adequately safeguard the fundamental rights of the prisoner.

2. Present Federal law

18 U.S.C. 4241 currently provides that a board of examiners must examine an inmate of a Federal penal institution who is alleged to be insane. The Board must report its findings to the Attorney General who may direct that the prisoner be removed to the United States hospital for defective delinquents.

18 U.S.C. 4242 states that an inmate of the United States hospital for defective delinquents whose sanity is restored prior to the expiration of his sentence may be retransferred to a penal institution.

3. Provisions of the bill, as reported

Under section 4245 a prisoner who is serving a sentence in a Federal facility may not be transferred over his objections to a mental hospital without a court order. Section 4245(a) provides that the court for the district in which the person is imprisoned may hold a hearing on the present mental condition of the person serving a sentence of imprisonment. First, if the person objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the government, at the request of the director of the facility in which the person is imprisoned, may file a motion with the court for a hearing on his or her present mental condition. A motion filed under this subsection stays the transfer of the person until the procedures contained in this section are completed.

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[89] See *Matthews* v. *Hardy*, 420 F.2d 607 (D.C. Cir. 1969), cert. denied, 397 U.S. 1010 (1970).

[90] *United States ex rel. Schuster* v. *Herold*, *supra* note 87 at 1078.

After the motion is filed, the court must order a hearing to determine if there is reasonable cause to believe that the person may be presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

Section 4247(b) provides that after the court orders a hearing to determine the present mental condition of the defendant pursuant to this section, the court, in its discretion, may order that the defendant be examined by a qualified psychiatrist or a clinical psychologist. The defendant may request the court to designate an additional examiner selected by the defendant. Section 4247(b) also sets forth time limits applicable to the examination. These are identical to those with respect to section 4241 and the discussion there should be consulted here.

Section 4247(c) sets forth the requirements of the report that is to be filed and section 4247(d) describes the hearing that is to be held. Under subsection (c), the examiner's report must include, in addition to the diagnosis and prognosis, the examiner's opinion as to whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility. Under subsection (d), the hearing is required to meet certain due process requirements.

Subsection (d) of section 4245 provides that if, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court then must commit him to the custody of the Attorney General, who must hospitalize the person for treatment in a suitable facility. The phrase "suitable facility" is meant to include the psychiatric section of a prison. Thus a person who is committed under this section need not necessarily be transferred to another facility if the prison he is in has a suitable section for treatment.

The subsection also provides that the Attorney General shall hospitalize the person until he is no longer in need of custody for care or treatment or until expiration of the term of imprisonment, whichever is earlier. If he has not recovered from his mental illness before his sentence expires, procedures for commitment may be undertaken pursuant to section 4246. If, however, the person recovers before his sentence expires he is subject to release and reimprisonment pursuant to subsection (e) of this section. Accordingly, the Committee has taken precautions to insure that a person will not be wrongfully hospitalized or wrongfully detained in a suitable facility.

Under subsection (e), when the director of the facility in which the person is hospitalized determines that he has recovered from his mental disease or defect to the extent that he is no longer in need of custody for care or treatment in such a facility, such director shall file a certificate so stating with the clerk of the committing court. If, at the time of the filing of the certificate, the sentence imposed upon the person has not expired, the court must order that he be released from the facility and reimprisoned. Since, after the person is reimprisoned he will be in the custody of the

Bureau of Prisons, the Bureau may designate the place of imprisonment.

It should be noted that, while the procedures of section 4245 would not be applied to a prisoner who did not object to hospitalization, if such a prisoner objected to continued hospitalization at a later date, the procedures of this section would have to be followed if the Bureau of Prisons believed that continued hospitalization was necessary.

SECTION 4246. HOSPITALIZATION OF A PERSON DUE FOR RELEASE BUT SUFFERING FROM MENTAL DISEASE OR DEFECT

1. In General

Section 4246 covers those circumstances where State authorities will not institute civil commitment proceedings against a hospitalized defendant whose Federal sentence is about to expire or against whom all criminal charges have been dropped for reasons related to his mental condition and who is presently mentally ill. At such a point the responsibility for the care of insane persons is essentially a function of the States.[91] The Committee intends that this section be used only in those rare circumstances where a person has no permanent residence or there are no State authorities willing to accept him for commitment. If criminal charges are dropped for reasons other than the mental condition of the defendant, such as insufficient evidence, but the defendant was mentally ill, the Attorney General would release the defendant to State authorities.

2. Present Federal law

18 U.S.C. 4243 provides that the superintendent of the United States hospital for defective delinquents must notify the proper State authorities of the date of expiration of sentence of any prisoner who is still insane. The superintendent then must deliver the prisoner to these authorities.

18 U.S.C. 4247 sets out an alternate procedure to be followed where suitable arrangements are not available for the custody and care of a prisoner who is insane and whose sentence is about to expire. The Director of the Bureau of Prisons must certify, and the Attorney General must transmit, a certificate to the court for the district in which the prisoner is confined that, in the judgment of the Director, and the Board of Examiners provided for in 18 U.S.C. 4241, the prisoner is presently insane. The court then must order that the prisoner be examined by two qualified psychiatrists, one designated by the court and one selected by the prisoner. After the examination a hearing must be held, and if the court determines that the prisoner is insane or mentally incompetent and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the court may commit the prisoner to the custody of the Attorney General.

18 U.S.C. 4248 provides that a commitment pursuant to 18 U.S.C. 4247 shall run until the sanity of the person is restored or until

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[91] See *Higgins* v. *United States*, 205 F.2d 650 (9th Cir. 1953).

other suitable arrangements have been made with the State of residence of the prisoner. Whenever either of these events occur, the Attorney General must file a termination certificate with the committing court. In addition, it is provided that nothing in section 4248 precludes a prisoner committed under section 4247 from establishing his eligibility for release by a writ of habeas corpus.

3. Provisions of the bill, as reported

Subsection (a) of section 4246 places responsibility in the director of the facility in which a person is hospitalized and whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all charges have been dismissed for reasons related to the mental condition of the person, to determine preliminarily whether the defendant should be released. Whenever the director of the facility determines that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, he must determine whether other suitable arrangements for the care and custody of the person are available. In this context, it is expected that he will notify the proper authorities in the State in which the person maintains a residence or in which he was tried to determine if the State will assume responsibility for the defendant. If the State determines that he should be civilly committed, the director of the facility may transfer him upon expiration of his sentence to the proper State authorities. In essence, the person is about to be released and because of his condition the State has instituted civil commitment procedures as it would against any other mentally ill citizen. On the other hand, if there is no State to which the person has sufficient ties, then the head of the facility must proceed pursuant to this section. In addition, if the State determines that he is not in need of further hospitalization, the director of the facility may attempt commitment pursuant to this section since "suitable arrangements * * * are not available" in a State facility. Of course, any determination in a State proceeding is proper evidence at the hearing held under subsection (c) of this section.

If suitable arrangements for the custody and care of the person are not otherwise available, the director of the facility must transmit to the court for the district in which the person is confined a certificate stating that he is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for the custody and care are not otherwise available. The filing of the certificate stays the release of the person until completion of the procedures contained in this section. Upon receipt of the certificate, the court must order that a hearing be held to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to the property of another.

Subsection (b) provides for psychiatric examination and for reports under sections 4247 (b) and (c), and subsection (c) provides for a hearing under section 4247(d). Under those provisions the person must receive a due process hearing and the examiner must report to the court his opinions as to diagnosis and prognosis for the person and as to whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another or serious damage to property of another.

Subsection (d) provides that if, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to the property of another, the court must commit him to the custody of the Attorney General, who shall release him to the appropriate official in the State of the person's domicile or in which he was tried, if such State will assume responsibility for his custody, care, and treatment. The Attorney General is directed to make all reasonable efforts to cause such a State to assume such responsibility. If, nevertheless, the State will not assume responsibility, the Attorney General must hospitalize the person for treatment in a suitable facility. The duration of the commitment is until (1) such a State will assume such responsibility or (2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another, whichever is earlier. The Attorney General is instructed under this subsection, moreover, to continue periodically to exert all reasonable efforts to cause a State to assume responsibility for the person's custody, care and treatment.

Under the provisions of subsection (e), if the director of the facility in which the person is hospitalized determines that he has recovered from the mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he must file a certificate to that effect with the clerk of the court that ordered the commitment, and the clerk must send a copy of the certificate to the person's counsel and to the attorney for the government. The court must then either release the person or, on motion of the attorney for the Government or on its own motion, hold a hearing to determine whether he should be released. The person must be released if the court finds, by a preponderance of the evidence, that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another. If the person does not meet the criteria for unconditional release but the court finds that the person has recovered from his mental disease or defect to such an extent that his conditional release under a prescribed regimen of medical care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be discharged under an appropriate prescribed regimen of medical care or treatment on the explicit condition that he comply with the prescribed regimen. The court at any time may, after a hearing, modify or eliminate the regimen of medical care or treatment employing the same criteria applicable to the original determination. These provisions are similar to those with respect to section 4243 dealing with persons acquitted by reason of insanity, and the discussion there should be consulted here.

Subsection (f) provides a procedure for dealing with the situation in which the released person fails to comply with the prescribed regimen of medical care or treatment. Under this procedure the director of the medical facility responsible for administering the regimen imposed under subsection (e) shall notify the Attorney General and the court having jurisdiction over the case of the failure to comply with the prescribed regimen. In a procedure similar to revocation of probation upon notice by the medical director or other probable cause to believe the person has failed to comply with the regimen, the person may be arrested and, upon arrest, must be brought without unnecessary delay before the court having jurisdiction. The court must, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

Section 4247(e)(1), dealing with annual reports by the director of the facility concerning a defendant committed under this section, and section 4247(h), dealing with the continuing availability of habeas corpus relief, provide similar procedures to those provided in other sections of this chapter.

Subsection (g) of section 4246 provides the procedure to be followed in the case of a person against whom all charges have been dropped for reasons unrelated to his mental condition, such as in a case where there is not enough evidence to prove guilt of an offense, but who is, in the opinion of the director of the facility in which he has been hospitalized, presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. Since the Federal Government would not have enough contacts with the person to justify continued Federal hospitalization of a person if there were no Federal offense involved to justify such hospitalization, this subsection requires that the Attorney General, upon receiving a certificate from the director of the facility in which the person was hospitalized that the person needed continued hospitalization, notify the appropriate official of the State in which the person was domiciled or in which he was tried that he wished to place the person in that State's custody. If the Attorney General received notice that neither State would take responsibility, he would have to release the defendant. In any event, he could not hold the person longer than 10 days after the certification by the director of the facility in which the person was hospitalized.

SECTION 4247. GENERAL PROVISIONS FOR CHAPTER 313

This section contains, in subsection (a), the definition of "rehabilitation program" as educational training to assist the defendant in understanding society and the magnitude of his offense, vocational training, drug, alcohol, and other treatment programs to assist in overcoming psychological or physical dependence, and organized sports and recreation programs; and the definition of "suitable facility" as a facility that is suitable to provide care or treatment given the nature of the offense and the characteristic of the defendant.

Section 4247 also contains the general procedures for psychiatric examinations and reports (subsections (b) and (c)), rights at hearings (subsection (d)), reports of mental facilities (subsection (e)(1)), admissibility of defendant's statement made during a mental examination (subsection (g)), and rights to habeas corpus (subsection (h)). These provisions are discussed in detail in the discussion of the preceding sections.

Subsection (e)(2) requires the director of the facility in which a person is hospitalized under section 4241, 4243, 4244, 4245, or 4246 to inform the person of available rehabilitation programs, as defined in subsection (a).

Subsection (f) of this section provides for a new procedure under which the court, on written request of defense counsel, may in its discretion order a videotape record to be made of the defendant's testimony or interview upon which the periodic report of the director of the suitable facility pursuant to subsection (e)(1) is based. If the court orders a videotape record to be prepared, such record shall be submitted to the court along with the periodic report. The purpose of this subsection is, by allowing a videotape record to be created, to insure the quality of mental examinations of persons hospitalized under this subchapter, and to furnish courts with a better basis upon which to make ultimate decisions as to the mental competency, sanity, and dangerousness of such persons.

Subsection (i) supplements subsection (h) with respect to habeas corpus, by providing that regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to subsection (e) of section 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility. A copy of the motion shall be sent to the director of the facility and the attorney for the government. Motions may not be filed within 180 days of a court determination that the person should continue to be hospitalized.

Finally, this section, in subsection (j), authorizes the Attorney General to contract for non-Federal facilities in order to hospitalize for treatment persons committed to his custody pursuant to this chapter, authorizes him to apply for civil commitment to the States for a person in his custody pursuant to section 4243 or 4246, directs him to consider the availability of appropriate rehabilitation programs before deciding in which facility to place a person under section 4241, 4243, 4244, 4245, or 4246, and directs him to consult with the Secretary of Health and Human Services on the implementation of the chapter and on establishment of standards for facilities for implementing the chapter. It is intended that the Attorney General will make the application for State commitment unless there is clear reason not to do so in a particular case.

TITLE V—DRUG ENFORCEMENT AMENDMENTS

INTRODUCTION

The drug enforcement amendments of Title V of the bill (Sections 501–526) are divided into two parts. The first, Part A, is designed to improve the penalty structure for major drug trafficking offenses. The second, Part B, contains a number of amendments that improve regulatory authority regarding controlled substances. In particular, these amendments in Part B are intended to enhance the government's ability to stem the diversion of licit, but controlled, substances for improper use.

PART A—CONTROLLED SUBSTANCES PENALTIES

1. In general

The purpose of Part A of Title V of the bill (Sections 501–504) is to provide a more rational penalty structure for the major drug trafficking offenses punishable under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.). Illicit trafficking in drugs is one of the most serious crime problems facing the country, yet the present penalties for major drug offenses are often inconsistent or inadequate. Part A of Title V primarily focuses on three major problems with current drug penalties.

First, with the exception of offenses involving marihuana (*see* 21 U.S.C. 841(b)(6)), the severity of current drug penalties is determined exclusively by the nature of the controlled substance involved. While it is appropriate that the relative dangerousness of a particular drug should have a bearing on the penalty for its importation or distribution, another important factor is the amount of the drug involved. Without the inclusion of this factor, penalties for trafficking in especially large quantities of extremely dangerous drugs are often inadequate. Thus, under current law the penalty for trafficking in 500 grams of heroin is the same as that provided for an offense involving 10 grams. The drug penalties schedule of the Criminal Code Reform bill (S. 1630) reported by the Committee in the 97th Congress [1] addressed this problem by punishing as a Class B felony (up to 25 years' imprisonment) offenses involving trafficking in large amounts of opiates and other extremely dangerous drugs. Based on this approach, this title amends 21 U.S.C. 841 and 960 to provide for more severe penalties than are currently available for such major trafficking offenses.

The second problem addressed by Part A of Title V is the current fine levels for major drug offenses. Drug trafficking is enormously profitable. Yet current fine levels are, in relation to the illicit profits generated, woefully inadequate. It is not uncommon for a major drug transaction to produce profits in the hundreds of thousands of dollars. However, with the exception of the most recently enacted penalty for domestic distribution of large amounts of marihuana, the maximum fine that may be imposed is $25,000.[2] Part A of Title V provides more realistic fine levels that can serve as appropriate punishments for, and deterrents to, these tremendously lucrative crimes.[3]

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[1] See S. Rept. No. 97-307, 97th Cong., 1st Sess.

A third problem addressed by Part A is the disparate sentencing for offenses involving Schedule I and II substances, which depends on whether the controlled substance involved in the offense is a narcotic or non-narcotic drug. Offenses involving Schedule I and II narcotic drugs (opiates and cocaine) are punishable by a maximum of 15 years' imprisonment and a $25,000 fine. But in the case of all other Schedule I and II substances, the maximum penalty is only five years' imprisonment and a $15,000 fine, the same penalty applicable in the case of a violation involving a Schedule III substance. This penalty structure is at odds with the fact that non-narcotic Schedule I and II controlled substances include such extremely dangerous drugs as PCP, LSD, methamphetamines, and methaqualone, and that Federal prosecutions involving these drugs typically involve huge amounts of illicit income and sophisticated organizations. Removing the distinction, for the purposes of sentencing, between narcotic, as opposed to non-narcotic, controlled substances in Schedules I and II was proposed in S. 1951 in the 97th Congress, and this concept is included in this title.

2. Present Federal law

Offenses involving domestic trafficking in controlled substances are governed by 21 U.S.C. 841. Subsection (a) of section 841 punishes those who knowingly or intentionally (1) manufacture, distribute, distribute or dispense, or possess with intent to manufacture, distribute, distribute or dispense, a controlled substance; or (2) create, distribute, dispense, or possess with intent to distribute or dispense, a counterfeit substance.[4] The penalties for these offenses are set out in subsection (b) of section 841, and include terms of imprisonment, fines, and special parole terms.[5] The maximum penalties are doubled if the offender has previously been convicted of a Federal drug offense. In the case of an attempt or conspiracy to commit one of the offenses described in 21 U.S.C. 841(a), the penalty is to be the same as for the offense which was the object of the attempt or conspiracy.[6] Where an offense involves distribution to persons under age twenty-one, the applicable maximum penalties under 21 U.S.C. 841(b) are doubled, or if the offender has a previous Federal drug conviction, they are tripled.[7]

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[2] 21 U.S.C. 841(b)(6) provides for a maximum fine of $125,000 for offenses involving in excess of 1,000 pounds of marihuana.

[3] If enacted, the generally applicable fine levels set out in the sentencing provisions of Title II of the bill will supersede Title V's amendments of the fines prescribed in 21 U.S.C. 841 and 960, except to the extent that the fines provided under Title V are higher than the generally applicable fines in Title II. See 18 U.S.C. 3559(b)(1) as amended in section 202 of the bill. The generally applicable fine levels for felonies, set out in 18 U.S.C. 3571, as amended by section 202 of the bill, are $250,000 where the defendant is an individual and $500,000 where the defendant is an organization.

[4] A "counterfeit substance" is a controlled substance which, or the container or labeling of which, bears false or misleading information about the true manufacturer, dispenser, or distributor. See 21 U.S.C. 802(7).

[5] No special parole term is prescribed for an offense involving a Schedule V controlled substance.

[6] See 21 U.S.S. 846.

As noted above, the severity of the penalties described in 21 U.S.C. 841 depends, with but one exception, solely on the scheduling of the controlled substance involved, and in the case of a controlled substance in Schedule I or II, on whether the controlled substance is a "narcotic drug." [8] The only instance in which the amount of controlled substance influences the severity of the penalty is in the case of marihuana. If the offense involves more than 1,000 pounds of marihuana, 21 U.S.C. 841(b)(6) prescribes enhanced fine and imprisonment penalties.[9] Otherwise, the current maximum penalties range from a 15-year prison term and $25,000 fine in the case of an offense involving a narcotic Schedule I or II controlled substance to a one-year prison term and $5,000 fine in the case of an offense involving a Schedule V controlled substance. Distinct penalties apply for offenses involving narcotic Schedule I and II substances (21 U.S.C. 841(b)(1)(A)), non-narcotic Schedule I and II substances and Schedule III substances (21 U.S.C. 841(b)(1)(B)), Schedule IV substances (21 U.S.C. 841(b)(2)), Schedule V substances (21 U.S.C. 841(b)(3)), distribution of small amounts of marihuana for no remuneration (21 U.S.C. 841(b)(4)),[10] phencyclidine (21 U.S.C. 841(b)(5)),[11] and more than 1,000 pounds of marihuana (21 U.S.C. 841(b)(6)).[12]

Major offenses involving the illegal import and export of controlled substances are governed by 21 U.S.C. 960. The offenses punishable under 21 U.S.C. 960(a) include (1) the knowing or intentional import or export of controlled substances; (2) possessing certain controlled substances on board vessels, aircraft, or vehicles arriving in or departing from the country; and (3) manufacture or distribution of a controlled substance with knowledge or intent that it will be unlawfully imported into the United States. The penalties for these offenses are set out in 21 U.S.C. 960(b). Like the penalties for offenses under 21 U.S.C. 841, these penalties vary in severity according to the scheduling of the controlled substance involved. However, the penalty structure of 21 U.S.C. 960(b) is much less complex. In the case of a narcotic Schedule I or II substance, the penalty is a maximum of fifteen years' imprisonment and a $25,000 fine. A special parole term of not less than three years also applies. In the case of all other controlled substances, a maximum five-year term of imprisonment and $15,000 fine applies.[13] Thus, one striking disparity between the penalties for domestic violations and those for import and export violations is that an offense involving the domestic trafficking in more than 1,000 pounds of marihuana is punishable by a maximum of fifteen years' imprisonment and a $125,000 fine under 21 U.S.C. 841(b)(6), but an importation offense involving the same amount of marihuana punishable under 21 U.S.C. 960 is subject to a maximum penalty of only five years' imprisonment and a $15,000 fine.

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[7] See 21 U.S.S. 845.

[8] The term "narcotic drug" is defined in 21 U.S.C. 802(16) and includes opiates and cocaine. The definition of this term is amended in section 505 of the bill to give a more complete description of the types of dangerous substances in this category.

[9] In addition, 21 U.S.C. 841(b)(4) provides that distribution of a small amount of marihuana for no remuneration is to be treated as simple possession under 21 U.S.C. 844.

[10] Marihuana is a non-narcotic Schedule I substance.

[11] Phencyclidine (PCP) is a Schedule II non-narcotic substance.

[12] Unlike most of the other penalty provisions of 21 U.S.C. 841(b), section 841(b)(6) prescribes no special parole term for offenses involving large amounts of marihuana.

[13] A special parole term of not less than two years applies where the offense involves a non-narcotic Schedule I or II substance or a Schedule III substance. The special parole term is one year in the case of a Schedule IV substance.

As is the case with offenses punishable under 21 U.S.C. 841, if an offense under 21 U.S.C. 960 is a second or subsequent Federal drug offense, the maximum penalties are doubled,[14] and an attempt or conspiracy to commit an offense punishable under 21 U.S.C. 960 carries the same penalty as the offense which was the object of the attempt or conspiracy.[15]

3. Provisions of the bill, as reported

SECTION 501

Section 501 provides that Title V may be cited as the "Controlled Substances Penalties Amendments Act of 1983."

SECTION 502

Section 502 amends 21 U.S.C. 841(b), the provision which sets out the penalties for the most serious domestic drug trafficking offenses. Each of the paragraphs of this section is discussed below.

Paragraph (1) revises section 841(b)(1), which describes the penalties for offenses involving controlled substances in Schedules I, II, and III. Currently, offenses involving narcotic Schedule I and II substances are governed by section 841(b)(1)(A), while offenses involving non-narcotic Schedule I and II substances and all Schedule III substances are governed by section 841(b)(1)(B).[16] Paragraph (1) of section 502 designates these subparagraphs (A) and (B) as subparagraphs (B) and (C) and creates a new subparagraph (A) under section 841(b)(1) that would provide, for offenses involving large amounts of particularly dangerous drugs, higher penalties than those now provided under section 841.

Under this new section 841(b)(1)(A), an offense involving (i) 100 grams or more of an opiate; (ii) a kilogram or more of cocaine (a more complex manner of defining opiates and cocaine is necessary in the amendment because of the way in which such substances are defined elsewhere in title 21, United States Code); (iii) 500 grams or more of PCP; or (iv) five grams or more of LSD, would be punishable by a maximum of 20 years' imprisonment and a fine of $250,000. Consistent with the current structure of section 841, these maximum penalties would be doubled where the defendant has a prior felony drug conviction. The amendment's description of the prior offense which may trigger the more severe penalty does, however, differ from the description used in current law. In current law, this enhanced sentencing is available only in the case of a prior Federal felony drug conviction. The amendment would permit prior State and foreign felony drug convictions to be used for this purpose as well. The prior conviction language of current provisions of section 841 and of section 962 (relating to importation and exportation offenses) is amended in other provisions of the bill in a similar manner to include State and foreign, as well as Federal, felony drug convictions.

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[14] See 21 U.S.C. 962.

[15] See 21 U.S.C. 963.

[16] As noted above, although marihuana is a non-narcotic Schedule I controlled substance, trafficking in amounts over 1,000 pounds is currently governed by 21 U.S.C. 841(b)(6), and distribution of small amounts for no remuneration is treated as mere possession under 21 U.S.C. 841(b)(4).

All other offenses involving a Schedule I or II substance, except those involving less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil, are to be punished under section 841(b)(1)(B). Thus, the current distinction, for purposes of punishment, between Schedule I and II substances which are narcotic drugs and those which are not has been abandoned. The maximum 15-year term of imprisonment currently applicable to offenses involving narcotic Schedule I and II substances is retained for all Schedule I and II offenses under section 841(b)(1)(B). However, the current maximum fine level of $25,000 has been raised to $125,000. By virtue of current section 841(b)(6), offenses involving large amounts of marihuana are already punishable at this level. Penalties for offenses involving Schedule III substances and lesser amounts of marihuana, hashish, and hashish oil, are to be governed by 21 U.S.C. 841(b)(1)(C), as amended. The current penalty of five years' imprisonment, is retained, but the maximum fine has been raised from $15,000 to $50,000. Marihuana is currently treated in the same manner as a Schedule III controlled substance when the amount involved is less than 1,000 pounds. Thus, this section's two-level treatment of marihuana offenses is generally consistent with current law.

Paragraph (2) amends 21 U.S.C. 841(b)(2) to raise the fine level for a violation involving a Schedule IV substance from $10,000 to $25,000. Also included is the amendment noted above in relation to new section 841(b)(1)(A) which would treat State and foreign, as well as Federal, felony drug convictions as prior convictions for the purpose of existing enhanced sentencing provisions.

Paragraph (3) amends 21 U.S.C. 841(b)(3) to raise the fine level for a violation involving a Schedule V substance from $5,000 to $10,000.

Paragraph (4) is a technical amendment to 21 U.S.C. 841(b)(4) (governing distribution of small amounts of marihuana) reflecting the redesignation of current section 841(b)(1)(B) as section 841(b)(1)(C).

Paragraph (5) deletes paragraphs (5) and (6) of 21 U.S.C. 841(b). Current 21 U.S.C. 841(b)(5) provides special penalties for violations involving PCP. Since PCP has now been designated as a Schedule II substance, this special provision is no longer necessary. Current 21 U.S.C. 841(b)(6) provides for heightened penalties for trafficking in large amounts of marihuana. Since section 502 of the bill provides that such offenses would be punishable under section 841(b)(1)(B) by a maximum penalty of 15 years' imprisonment and a $125,000 fine, this special provision is no longer necessary.

SECTION 503

Section 503 amends 21 U.S.C. 960(b), which sets out the penalties for the major drug importation and exportation offenses, in a manner consistent with section 502's amendments to 21 U.S.C. 841(b), discussed above. Each of the paragraphs of section 503 is discussed below.

Paragraph (1) redesignates current paragraphs (1) and (2) of 21 U.S.C. 960(b) as paragraphs (2) and (3) creates a new section 960(b)(1) which provides for heightened penalties for importation offenses involving large amounts of extremely dangerous drugs. This section is analogous to the new 21 U.S.C. 841(b)(1)(A) added by paragraph (1) of section 502 of the bill.

Paragraph (2) amends section 960(b)(2) (presently section 960(b)(1)), to consolidate the treatment of offenses involving all Schedules I and II substances except lesser amounts of marihuana and hashish, as was done with respect to section 841(b)(1) in section 502 of the bill. The current 15-year level of imprisonment is retained, but the fine is elevated from $25,000 to $125,000, as was done in section 502 of the bill with respect to the analogous offenses punishable under 21 U.S.C. 841(b)(1).

Paragraph (3) amends current 21 U.S.C. 960(b)(2) (redesignated as section 960(b)(3) in this section), which now governs offenses involving all controlled substances other than Schedule I and II narcotic drugs. As amended, this section would continue to govern violations involving lesser amounts of marihuana and hashish, and all Schedule III, IV, and V substances, would retain the current five-year maximum term of imprisonment, but would raise the current fine of $15,000 to $50,000. Unlike 21 U.S.C. 841(b), 21 U.S.C. 960 does not provide separate penalties for offenses involving Schedule IV and V substances.

SECTION 504

Section 504 amends 21 U.S.C. 962 to permit prior State and foreign, as well as Federal, felony drug convictions to be considered for the purpose of this section's enhanced sentencing for repeat drug offenders. As noted above, various provisions of 21 U.S.C. 841(b) were amended in a similar manner.

PART B—DIVERSION CONTROL AMENDMENTS

1. In general and present Fedeal law

Part B of Title V (Sections 505–526) is designed to strengthen the government's authority to regulate controlled substances. In particular, the amendments set out in Part B are intended to address the severe problem of diversion of drugs of legitimate origin into the illicit market.

Diversion of legally produced drugs into illicit channels is a major part of the drug abuse problem in the United States. It is estimated that between 60 and 70 percent of all drug-related deaths and injuries involve drugs that were originally part of the legitimate drug production and distribution chain.[17] Also, diversion of legally produced drugs often evidences the same sort of large-scale trafficking more commonly associated with the trade in wholly illicit drugs. For example, the Justice Department informed the

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[17] Crime Control Act Hearings (statement of the Department of Justice, p. 77).

Committee that 21 practitioners registered to dispense controlled substances convicted as the result of an investigation named "Operation Script" were responsible for the diversion of approximately 21.6 million dosage units of controlled substances.[18]

Illicit diversion of drugs of legal origin is not a new phenomenon. Indeed, the passage by the Congress in 1970 of the Controlled Substances Act (CSA)[19] was very much a response to a diversion problem that had grown so severe at that time that nearly half of all legitimately produced amphetamines and barbiturates were being diverted to illicit channels.[20] In order to address this problem of drug diversion, the CSA provided for a "closed" system of drug distribution for legitimate handlers of controlled drugs.

Under the Controlled Substances Act, drugs are controlled through the exercise of the Attorney General's rulemaking authority. Based on the severity of the abuse potential of a particular drug, the extent to which it leads to physical or psychological dependence, and has an accepted medical use, a drug is placed on one of five schedules.[21] For example, a Schedule I substance is one that has a high potential for abuse and no accepted medical use, while a Schedule V substance is one with a relatively low potential for abuse and dependence and an accepted medical use for treatment.[22]

Those who are to manufacture, distribute, import, export, dispense and administer controlled substances legally must obtain a registration from the Attorney General. Those registered must adhere to certain recordkeeping and reporting requirements that permit monitoring the flow of controlled substances within the "closed" system. In keeping with the nature of the drug diversion problem at the time of its enactment, the CSA's regulatory scheme focuses most sharply on the activities of manufacturers and distributors of controlled substances, with lesser controls applicable to practitioners, that is, those who dispense, prescribe, or administer controlled substances to ultimate users.

In many respects, the current provisions of the Controlled Substances Act have been quite effective in meeting the diversion problem at the manufacturer and distributor levels.[23] For the most part, current law generally provides strong authority to regulate these levels of the "closed" distribution chain. Registration to manufacture or distribute controlled substances is issued only when clearly consistent with the public interest. Administrative, civil, and criminal enforcement tools generally operate effectively at this level and mechanisms to control diversion by manufacturers and distributors have largely proven adequate.

Unfortunately, experience under the Controlled Substances Act over the past decade has demonstrated that the same strong regulatory authority to maintain a "closed" distribution chain does not exist at the practitioner level. Yet, it is estimated that 80 to 90 percent of all current diversion occurs at this level.[24] Under current law, the grounds for denial or revocation of the registration of a practitioner are very limited. Indeed, the Attorney General must presently grant a practitioner's registration application unless his State license has been revoked or he has been convicted of a felony drug offense,[25] even though such action may clearly be contrary to the public interest.

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[18] *Ibid.*

[19] 21 U.S.C. 801 et seq.

[20] H.R. Rept. No. 91-1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News, 4566, 4572.

[21] 21 U.S.C. 811 and 812.

[22] 21 U.S.C. 812(b) (1) and (4).

[23] Crime Control Act Hearings (statement of the Department of Justice, p. 79).

Thus, one weakness of current law is that it has not been adequate to address the shift in the source of diversion from the manufacturer and distributor levels to the practitioner level. Over the past decade other weaknesses of the Controlled Substances Act have also surfaced as ambiguities and loopholes in the law have come into focus. For example, the procedural requirements for controlling a drug under 21 U.S.C. 811 have proven sufficiently time consuming that they preclude a swift response when an as yet uncontrolled drug rapidly enters the illicit market and creates a significant health problem. Absence of adequate recordkeeping requirements has inhibited efforts to control the diversion of highly abused nonnarcotic drugs. Insufficient authority exists to safeguard dangerous drugs held by persons whose registration has expired or who have gone out of business. Authority to control the import and export of controlled substances has proven too limited in certain respects.

At the same time, certain regulatory requirements of current law have proven overly stringent. Annual registration requirements for practitioners, who comprise the overwhelming majority of all controlled substances registrants and who are generally law-abiding, has become an excessive regulatory burden for both practitioners and the government. Insufficient authority to exempt from controls substances that have no or low abuse potential or that are needed for scientific and research purposes has resulted in unnecessary regulation.

The diversion control amendments of Part B of Title V of the bill are designed to address this variety of problems that have arisen in the more than a decade of experience under the Controlled Substances Act. In addition to addressing the more recent problem of maintaining the intended "closed" system at the practitioner level, they strengthen other aspects of current regulatory authority where necessary and at the same time give additional regulatory flexibility where current law has proven too rigid. Also included is a grant-in-aid program through which financial assistance could be given to States and localities in order to increase their capacities to respond to the drug diversion problem.

2. Provisions of the bill, as reported

SECTION 505

Section 505 amends 21 U.S.C. 802, which sets forth the definitions of terms used in the Controlled Substances Act,[26] first, by adding a definition of the term "isomer," and second, by providing an expanded and more detailed definition of the term "narcotic drug."

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[24] *Ibid.*

[25] See 21 U.S.C. 823(f) and 824(a).

[26] 21 U.S.C. 801 et seq.

An isomer of a drug is a different compound, but one which has the same number and kind of atoms. Thus, although an isomer is not strictly identical to the drug, it is so similar that it has many of the same chemical and physical properties of the drug. Isomers include optical, positional, and geometric isomers. In many instances, substances listed in Schedules I and II (see 21 U.S.C. 812(c)) include drugs and their isomers. Moreover, international treaty obligations of the United States, such as the 1961 Single Convention on Narcotic Drugs and the 1971 Convention of Psychotropic Substances, require control of certain isomers of dangerous drugs.

Because of the absence of a clear definition of what is meant by the term "isomer," clandestine manufacturers have attempted to circumvent the law by manufacturing positional and geometric isomers of hallucinogens in Schedule I and optical and geometric isomers of cocaine. Indeed, this practice with respect to cocaine has given rise to frequent assertion of what is termed the "isomer defense." [27] Isomers of dangerous drugs often elicit similar harmful pharmacological effects, and have no legitimate commercial use. The definition of the term "isomer" set out in section 505's amendment of 21 U.S.C. 802 will assure that those isomers requiring control under the Controlled Substances Act are clearly covered by the statute.

Section 505 amends the definition of "narcotic drug" currently appearing in 21 U.S.C. 802(16) [28] in the following ways. First, the definition of opium and opiates is unified in a more concise paragraph (A). Second, poppy straw and its concentrate (not used commercially in the United States at the time of enactment of the Controlled Substances Act) is added to the definition. Third, coca leaves are more clearly described. Fourth, cocaine and ecogine [29] are given a detailed specific listing within the definition of "narcotic drug." (This also assures consistency with the Single Convention on Narcotic Drugs.)

The definitional amendments in section 505 are designed largely to clarify the scope of current law and cure any potential loopholes or ambiguities. There are no significant changes in the scope of substances subject to control.

SECTION 506

Section 506 amends 21 U.S.C. 811 by adding a new subsection (h) that would permit the temporary emergency scheduling of a substance which presents an immediate danger to public safety. Under current 21 U.S.C. 811, before a substance may be designated for control under the Controlled Substances Act by the Attorney General, the Secretary of Health and Human Services (HHS) must first submit a scientific and medical evaluation of the substance,[30] and the prior notice and hearing requirements of the Administrative Procedure Act (5 U.S.C. 500 *et seq.*) must be met as provided in 21 U.S.C. 811(a). Historically, even when given a high priority, such as in the case of the rescheduling of PCP and the scheduling of its analogs, a scheduling action under current law takes at least six months, and often as long as a year. During the interim between identification of a drug that presents a major abuse problem and the eventual scheduling of the substance, enforcement actions against traffickers are severely limited and a serious health problem may arise.

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[27] The "isomer defense" was soundly rejected in *United States* v. *Fince*, 670 F.2d 1356 (4th Cir. 1982).

[28] Because of the addition of the definition of "isomer," the definition of "narcotic drug" is redesignated in section 505 of the bill as 21 U.S.C. 802(17).

[29] Ecogine is another compound found in coca leaves.

[30] 21 U.S.C. 811(b).

Under new subsection (h), the Attorney General would be permitted to control a substance on a temporary basis without meeting the prior notice and hearing requirements of 21 U.S.C. 811(a) or the Department of Health and Human Services evaluation requirement of 21 U.S.C. 881(b), if such action was "necessary to avoid an imminent hazard to the public safety." In issuing a temporary ruling under this new provision, the Attorney General would be required to consider only those factors set out in 21 U.S.C. 811(c) (4), (5), and (6) which relate to the history, current pattern, scope, duration and significance of abuse of the substance, and the risk it poses to the public health. New subsection (h)(1) specifically focuses attention on actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or marketing.

The Attorney General is to notify the Secretary of Health and Human Services of the proposed temporary scheduling of any drug or substance under new subsection (h). The Secretary may object to the temporary scheduling of the substance within thirty days. However, unless the Secretary has currently available evidence relating to the lack of abuse potential of the substance, his considerations are confined to the same factors which are to have been assessed by the Attorney General in his determination. Should the Secretary object to the temporary scheduling his decision is binding on the Attorney General.[31] Temporary scheduling under new subsecton (h) is to expire after one year, but the Attorney General may extend the temporary scheduling for an additional period of six months during the pendency of routine control proceedings under section 811(a).

If a substance is subject to the temporary control provided in new subsection (h) of 21 U.S.C. 811, the penalty for its illegal manufacture, distribution, dispensing, or possession with intent to engage in such conduct, is to be the same as that provided in 21 U.S.C. 841(b)(1)(C) for Schedule III substances. Of the regulatory requirements of title II, Part C of the Controlled Substances Act, only the registration and reporting and recordkeeping requirements of 21 U.S.C. 822 and 827 are to apply to temporarily scheduled substances.

The new emergency control authority provided in section 506 of the bill is designed to allow the Attorney General to respond quickly to protect the public from drugs of abuse that appear in the illicit traffic too rapidly to be effectively handled under the lengthy routine control procedures. In such situations, law enforcement considerations and the need to protect the public may require action that cannot await the exhaustive medical and scientific determinations ordinarily required when a drug is being considered for control. The emergency control amendment of section 506 permits such action on a temporary basis until the more extensive scheduling procedures required under current law can be met.

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[31] The decision of the Secretary of Health and Human Services is binding only with respect to the temporary scheduling of the substance, and not with respect to any subsequent control proceedings under 21 U.S.C. 811(a).

SECTION 507

Under current 21 U.S.C. 811(g)(1), the Attorney General may exempt from a schedule of control certain compounds, mixtures, or preparations containing stimulant or depressant substances. Section 507 of the bill amends this provision of current law to clarify and expand the exemption authority of the Attorney General. The compounds, mixtures, and preparations which may be excluded are those that do not present any significant potential for abuse because of the nature of their preparation. As amended, 21 U.S.C. 811(g)(1) would specify three categories of compounds which may be exempted from the controls of the Controlled Substances Act. These are "exempt over the counter preparations," "exempt prescription preparations," and "exempt chemical preparations."

As defined in paragraphs (A), (B), and (C) of section 811(g)(1), as amended, "exempt over the counter preparations" are those containing a nonnarcotic controlled substance which may be lawfully sold over-the-counter under the Federal Food, Drug and Cosmetic Act;[32] "exempt prescription preparations" are those containing a nonnarcotic controlled substance which is combined with one or more noncontrolled active ingredients so that the potential for abuse is vitiated; and "exempted chemical preparations" are compounds, mixtures, or preparations which are not for administration to humans or animals and do not present any significant abuse potential. Section 507's expansion of the authority to exempt substances from control which do not pose a significant threat to public health and safety allows a reduction in unnecessary regulatory burdens. Because the concept of "exempt prescription preparations" added to the exemption authority under 21 U.S.C. 811(g) is analogous to the basis for exemption set out in current 21 U.S.C. 812(d), the separate exemption authority under section 812(d) is deleted.

SECTION 508

Section 508 amends 21 U.S.C. 822(a) by authorizing the Attorney General to establish a registration period for practitioners that may be up to three years in duration, but not less than one year. Currently, practitioners dispensing controlled substances, as well as manufacturers and distributors of controlled substances, must register annually. The annual registration requirement for manufacturers and distributors is retained.

Practitioners, those who dispense controlled substances to ultimate users, now comprise almost 98 percent of all registrants.[33]

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[32] 21 U.S.C. 301 et seq.

[33] Crime Control Act Hearings (statement of the Department of Justice, p. 83).

Thus, this amendment will allow substantial cost and time savings to both practitioner registrants and the government by alleviating the burden of annual registration.

SECTION 509

Improper diversion of controlled substances by practitioners is one of the most serious aspects of the drug abuse problem. However, effective Federal action against practitioners has been severely inhibited by the limited authority in current law to deny or revoke practitioner registrations. Under current 21 U.S.C. 823(f), the Attorney General must register a physician, pharmacy, or other practitioner as long as the practitioner is authorized to dispense controlled substances in the State in which he practices. The authority to deny or revoke a practitioner's registration under current 21 U.S.C. 824(a) is limited to instances in which the registrant has (1) materially falsified an application, (2) been convicted of a State or Federal felony relating to controlled substances, or (3) had his State registration or license suspended, revoked or denied.

The current limited grounds for revoking or denying a practitioner's registration have been cited as contributing to the problem of diversion of dangerous drugs.[34] In addition, because of a variety of legal, organizational, and resource problems, many States are unable to take effective or prompt action against violating registrants.[35] Since State revocation of a practitioner's license or registration is a primary basis on which Federal registration may be revoked or denied, problems at the State regulatory level have had a severe adverse impact on Federal anti-diversion efforts. The criteria of prior felony drug conviction for denial or revocation of registration has proven too limited in certain cases as well, for many violations involving controlled substances which are prescription drugs are not punishable as felonies under State law. Moreover, delays in obtaining conviction allow practitioners to continue to dispense drugs with a high abuse potential even where there is strong evidence that they have significantly abused their authority to dispense controlled substances.

Clearly, the overly limited bases in current law for denial or revocation of a practitioner's registration do not operate in the public interest. Section 509 of the bill would amend 21 U.S.C. 824(f) to expand the authority of the Attorney General to deny a practitioner's registration application. Under 21 U.S.C. 824(f), as amended by section 509 of the bill, the Attorney General would be required to register a practitioner authorized under State law to dispense or conduct research with controlled substances unless he made a specific find that registration would be "inconsistent with the public interest." Whether registration is in the public interest is to be based on consideration of the following factors: (1) the recommendation of the appropriate State licensing board or professional disciplinary authority;[36] (2) the applicant's past experience in dispensing or conducting research with respect to controlled substances; (3) the applicant's prior conviction record concerning controlled substances offenses; [37] (4) compliance with applicable State, Federal, or local controlled substances laws; and (5) other factors that are relevant to and consistent with the public health and safety.[38]

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[34] General Accounting Office, *Retail Diversion of Legal Drugs—A Major Problem With No Easy Solution* (Washington, D.C. 1978).

[35] Drug Enforcement Administration, *Comprehensive Final Report on State Regulatory Agencies and Professional Associations* (Washington, D.C. 1977).

[36] Thus, it would no longer be necessary that the State authority have in fact revoked the practitioner's license or registration before Federal registration could be denied.

The amendment set forth in section 509 will continue to allow the Attorney General to routinely register most practitioner applicants. However, in those cases in which registration is clearly contrary to the public interest, the amendment would allow a swift and sure response to the danger posed to the public health and safety by the registration of the practitioner in question. The broader considerations for registration of practitioners set out in section 509 of the bill are similar to those applicable under current law to registration applications on the part of the manufacturers and distributors of controlled substances.[39] However, the amendment would continue to give deference to the opinions of State licensing authorities, since their recommendations are the first of the factors to be considered with respect to practitioner applications.[40]

SECTION 510

Section 510 amends 21 U.S.C. 824(a) to add to the current bases for denial, revocation, or suspension of registration a finding that registration would be inconsistent with the public interest on the grounds specified in 21 U.S.C. 823, which will include consideration of the new factors added by section 509, as discussed *supra*.

SECTION 511

Section 511 amends 21 U.S.C. 824(f) by adding a new provision that would authorize the Attorney General to place under seal any controlled substances owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business. The controlled substances are to be held for the benefit of the registrant or his successor in interest for 90 days. At the end of this 90-day period, the Attorney General may dispose of the controlled substances in accordance with 21 U.S.C. 881(e), which governs the disposal of controlled substances forfeited to the United States.

The amendment set forth in section 511 is designed to give the Attorney General necessary authority to safeguard quantities of controlled substances which pose a risk of theft or hazard to the public health and safety because they are in the possession of those no longer registered or who have gone out of business. This authority is in addition to the existing authority under current 21 U.S.C.

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[37] The criteria of prior conviction for a drug offense would thus no longer be limited to felony convictions.

[38] By virtue of the amendment to 21 U.S.C. 824(a) in section 510 of the bill, these factors could also serve as the basis for revocation or suspension of registration.

[39] See 21 U.S.C. 823 (a), (b), (d), and (e).

[40] Registration of a physician under the Controlled Substances Act is a matter entirely separate from a physician's State license to practice medicine. Therefore, revocation or registration only precludes a physician from dispensing substances controlled under the Controlled Substances Act and does not preclude his dispensing other prescription drugs or his continued practice of medicine.

824(f) to forfeit controlled substances held by those whose registration has been revoked or suspended.[41]

SECTIONS 512 AND 513

Sections 512 and 513 amend 21 U.S.C. 827(c)(1) which sets forth exemptions from the general recordkeeping requirements imposed on practitioners with respect to their prescribing, dispensing, or administering controlled substances. These amendments eliminate the current artificial distinction for purposes of recordkeeping between narcotic and nonnarcotic controlled substances. Section 512 amends 21 U.S.C. 827(c)(1)(A) so that it applies to the prescribing of all controlled substances by practitioners. As amended, this provision would exempt from practitioners recordkeeping requirements only the prescribing of controlled substances "in the lawful course of their professional practice." As amended by section 513, 21 U.S.C. 827(c)(1)(B) would further exempt practitioners from the requirement of keeping records concerning the administering of controlled substances, unless the practitioner "regularly engages in the dispensing or administering of controlled substances and charges his patients * * * for substances so administered." This same formulation applies under current 21 U.S.C. 827(c)(1)(B) to a practitioner's dispensing of nonnarcotic controlled substances.

The additional recordkeeping burden on practitioners resulting from the amendments set out in sections 512 and 513 will be minimal, but the increase in accountability will be a major law enforcement improvement. The present lack of recordkeeping with respect to the dispensing of nonnarcotic drugs is a serious problem in detecting illicit sale and diversion by practitioners. These amendments eliminate this loophole while still preserving a recordkeeping exemption for prescriptions and limited administration of controlled substances within the practitioner's office.

SECTION 514

Section 514 amends 21 U.S.C. 827 by adding a new subsection that would require registrants to report a change of professional or business address. This will facilitate the transmittal and prompt response to applications for registration renewal. Also, in light of the amendment in section 508 of the bill allowing the registration of practitioners to remain in effect for a period of up to three years, a requirement that registrants give notice of change of address is particularly appropriate.

SECTION 515

Currently, 21 U.S.C. 843(a)(2) prohibits the use of a registration number that is fictitious, revoked, suspended, or issued to another person. Section 515 of the bill adds to this list of prohibited acts the use of a registration number that has expired. Thus, this amendment cures the loophole in current law regarding use of an expired registration number and clarifies the legal status of a registrant who has failed to reapply for registration.

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[41] Clear authority to forfeit controlled substances possessed in violation of the Controlled Substances Act is added in section 517 of the bill.

SECTION 516

Addressing the serious problem of illicit diversion of legally produced drugs requires the concerted effort not only of Federal agencies, but of State and local law enforcement and regulatory agencies as well. However, for a number of reasons, many States and localities simply do not have the capacity to effectively address this problem.[42] Section 516 would provide a means of increasing the ability of States and localities to deal with the diversion problem by allowing the Attorney General to enter into grant-in-aid programs with State and local governments "to assist them to suppress the diversion of controlled substances from legitimate medical, scientific, and commercial channels." Funds appropriated for these grant-in-aid programs are to remain available until expended.

In its formal statement submitted to the Subcommittee on Criminal Law, the Department of Justice indicated that implementation of the grant-in-aid program would be preceded by an evaluation of the capabilities and needs of the States. Grants would be based on this evaluation and used for specific efforts aimed at diversion control. Moreover, the grants would be for specified terms with appropriate matching funds provided by the State.[43]

SECTION 517

Currently, controlled substances manufactured, distributed, dispensed, or acquired in violation of the Controlled Substances Act are subject to forfeiture under 21 U.S.C. 881(a)(1). Section 517 would amend this provision to include controlled substances that are possessed in violation of law. This amendment alleviates the problem now posed when a registrant has lawfully acquired controlled substances, but continues to possess them after his registration has expired or been terminated. In such situations, controlled substances are often left in unsecured or vacant buildings and so pose a serious risk of theft and danger to the public safety. Section 517 of the bill would give the Attorney General the authority to place such controlled substances under seal, retain them for safekeeping, and eventually dispose of them pursuant to forfeiture proceedings.[44]

SECTION 518

Under current 21 U.S.C. 952(a)(2), the importation of controlled substances in Schedules I and II and narcotic substances in Schedules III, IV, and V for medical, scientific, and other legitimate purposes is generally limited to those cases in which there is a finding that competition among domestic manufacturers is inadequate. This requirement has created difficulties in situations which routinely arise when researchers need specific substances for comparative studies on foreign-developed compounds that are unique in their manufacture. Section 518 would accommodate the need to import such substances by adding a new provision to 21 U.S.C. 952(a)(2) that would allow importation of limited quantities of controlled substances for purposes exclusively of ultimate scientific, analytic, or research uses.

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[42] Crime Control Act Hearings (statement of the Department of Justice, pp. 80–82).

[43] *Ibid.*

[44] The amendment to 21 U.S.C. 824 set out in section 511 of the bill requires that the Attorney General, when placing under seal controlled substances of a registrant whose registration has expired or ceased to do business, hold the substances for the benefit of the registrant for a period of 90 days. Only after the expiration of this 90-day period may the substances be forfeited and disposed of.

SECTION 519

Section 519 amends 21 U.S.C. 952(b)(2) by authorizing the Attorney General to require import permits for nonnarcotic Schedule III substances. Currently such permits are required for importation of narcotic Schedule III substances, but are not required for other Schedule III substances with high abuse potential unless such substances are listed in Schedule I or II of the Convention on Psychotropic Substances.[45] It is appropriate that import controls extend to all dangerous drugs classified in Schedule III of the Controlled Substances Act.

SECTION 520

Section 520 of the bill amends 21 U.S.C. 953(e) to tighten the criteria for export of controlled substances which are nonnarcotic Schedule III or IV substances or Schedule V substances. Under 21 U.S.C. 953(e)(1), export of these controlled substances is not permitted unless documentary proof is submitted showing that importation is not contrary to the laws or regulations of the "country of destination." Section 520 amends this provision to make it clear that the required documentation is to relate to the country where the controlled substance is destined for ultimate consumption for medical, scientific, or other legitimate purposes, and not to a country of transhipment. Section 520 of the bill also amends 21 U.S.C. 953(e) to require an export permit for nonnarcotic, as well as narcotic, Schedule III substances. This latter amendment parallels the requirement for import permits for all Schedule III substances provided in section 519 of the bill.

SECTION 521

Under current 21 U.S.C. 957(a)(2) registration is required of all persons exporting controlled substances in Schedules I, II, III, and IV, unless exemption from the registration requirement is specifically provided in 21 U.S.C. 952(b). Section 521 of the bill would extend this registration requirement to exporters of Schedule V substances. This amendment will eliminate confusion and bring the export requirements into conformity with all other registration requirements of the Controlled Substances Act.

SECTION 522

Section 522 modifies and clarifies the criteria for registration of an exporter or importer of Schedule I and II controlled substances under 21 U.S.C. 958(a). Under current section 958(a), the Attorney

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[45] An example of a Schedule III substance not now subject to the controls of 21 U.S.C. 952(b)(2) is phendimetrazine, a highly abused anorectic (appetite suppressant) drug used as a substitute for amphetamines.

General is to register the applicant exporter or importer if the registration is consistent with the publc interest and the obligations of the United States under international treaties, conventions, and protocols. In determining whether registration is in the public interest, the Attorney General is to consider the factors enumerated in 21 U.S.C. 823(a) which apply to registration of manufacturers of Schedule I and II substances.

Section 522 would amend 21 U.S.C. 958(a) so that the factors bearing on whether registration is in the public interest are listed in the section itself. These factors are largely based on those now appearing in 21 U.S.C. 823(a). However, the factor bearing on the adequacy of the measures to prevent diversion has been broadened. Currently, 21 U.S.C. 823(a)(1) refers to control against diversion by limiting the number of import and manufacturing establishments. While this should continue to be a consideration with respect to the factor of diversion control, it should not be the only element considered. Also, the factor set out in 21 U.S.C. 823(a)(3) relating to the applicant's promotion of technical advances in manufacturing is not carried forward since it bears no relevance to the application of an exporter or importer. Other differences between the factors specified in current 21 U.S.C. 823(a) and those added to 21 U.S.C. 958(a) by section 522 of the bill largely reflect the differences in the activities of manufacturers as opposed to importers and exporters.

SECTION 523

Under current 21 U.S.C. 958(b) a person registered to import or export Schedule I or II substances may import or export only those controlled substances specified in his registration. In contrast, the registrations of importers and exporters of substances in Schedules III, IV, and V are not drug specific. Thus, this latter category of registrants can trade in any and all substances in the Schedule for which they are registered, and the ability of the government to monitor import and export activity with respect to drugs of special interest in Schedules III, IV, and V is consequently inhibited. Section 523's amendment of 21 U.S.C. 958(b) would cure this problem by allowing the registrations of those exporting or importing any controlled substance to be limited to trading in specific controlled substances within particular schedules.

SECTION 524

Section 524 amends 21 U.S.C. 958(c) by listing the factors to be considered in determining whether registration of a person seeking to import or export controlled substances in Schedules III, IV, and V[46] is in the public interest. Currently, the factors to be considered for registration of exporters and importers are the same as those applicable to manufacturers and distributors of the same Schedule substances under 21 U.S.C. 823. As was done with respect to the registration criteria for importers and exporters of Schedule I and

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[46] Under current 21 U.S.C. 957(a)(2), persons exporting Schedule V controlled substances are not required to register. This provision of current law is amended in section 521 of the bill to require registration of exporters of Schedule V controlled substances. Thus, section 524's amendment of the criteria for registration of exporters under 21 U.S.C. 958(c) encompasses Schedule V exporters as well.

II substances in section 522 of the bill, section 524 amends current law to specify the factors of consideration in 21 U.S.C. 958, rather than cross-referencing the factors specified in 21 U.S.C. 823. The factors added to 21 U.S.C. 958(c) are virtually identical to those added to 21 U.S.C. 958(a) in section 522 of the bill, as discussed *supra.*

SECTION 525

Section 525 of the bill amends 21 U.S.C. 958 by inserting a new subsection (d)[47] which specifies the procedures that are to apply for denial, revocation, or suspension of the registration of an exporter or importer of controlled substances. Currently, the procedures governing such determinations with respect to domestic manufacturers, distributors, and dispensers of controlled substances under 21 U.S.C. 824 are made applicable to importer and exporter registrations by virtue of a cross-reference to section 824 in 21 U.S.C. 958(d). The procedures added to 21 U.S.C. 958 with respect to the registration of importers and exporters are virtually identical to those now appearing in 21 U.S.C. 824. Like those in 21 U.S.C. 824, they require the Attorney General to serve on the applicant or registrant an order to show cause why his registration should not be denied, revoked, or suspended. The applicant must appear and respond within thirty days, and the proceedings are governed by the requirements of the Administrative Procedure Act.[48] If there is an "imminent danger to the public health and safety," the Attorney General may suspend the registration of an exporter or importer simultaneously with the institution of proceedings under new subsection (d). The provision in current 21 U.S.C. 958(d) incorporating by reference the denial, revocation, and suspension procedures of 21 U.S.C. 824 is deleted.

Section 525 also amends current 21 U.S.C. 958(h) (redesignated as subsection (i)) which gives registered domestic manufacturers of bulk controlled substances an opportunity for a hearing with respect to the registration application of an importer. The amendment in section 525 makes it clear that such manufacturers are to have an opportunity to present their views on the adequacy of competition among domestic manufacturers. It also removes the requirement of a hearing, which has considerably slowed the process of reviewing import and export applications. Thus, this section will retain the opportunity for domestic manufacturers to raise pertinent issues regarding an import registration application, but will speed the process of approving registration so that new applicants can enter the market, provided they can demonstrate to the Attorney General that they meet the stringent registration requirements.

SECTION 526

Section 526 amends 21 U.S.C. 952 (A)(1) to allow the import of poppy straw and its concentrate in amounts that the Attorney General determines are necessary to medical, scientific, and other legitimate purposes, in the same manner as now provided for crude opium and coca leaves. Import of poppy straw and its concentrate has occurred for several years under emergency import authority.

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[47] Current subsections (d) through (h) of 21 U.S.C. 958 are redesignated as subsections (e) through (i).

[48] 5 U.S.C. 500 et seq.

TITLE VI—JUSTICE ASSISTANCE

INTRODUCTION

This title, among other things, establishes an Office of Justice Assistance within the Department of Justice to be made up of the Bureau of Justice Programs, the Bureau of Criminal Justice Facilities, the National Institute of Justice, and the Bureau of Justice Statistics. Substantially the same justice assistance provisions were introduced by Senators Thurmond and Laxalt on March 16, 1983, as a part of the Administration's "Comprehensive Crime Control Act of 1983" in title VIII of S. 829.

Comments were received on this proposal in hearings on S. 829[1] and S. 53, a bill covering the same subject matter introduced by Senator Specter.[2]

This title of S. 1762, as reported, is identical to title VIII of S. 829, except that it incorporates with minor changes the amendments adopted by the Committee in the course of its consideration of S. 53 on June 16, 1983.[3]

The justice assistance program authorized by this title is intended by the Administration and the Committee to provide a highly targeted program of Federal financial assistance, operating under a revised organizational structure within the Department of Justice, to State and local law enforcement authorities. The major provisions (1) reorganize the justice assistance program; (2) reauthorize the current assistance, statistics, and research programs; (3) target block grant Federal financial assistance on State and local anticrime activities of proven success; and (4) establish a new Bureau of Criminal Justice Facilities within the Office of Justice Assistance to administer a program designed, among other things, to assist State and local governments in the construction and modernization of correction facilities.

HISTORY OF JUSTICE ASSISTANCE

The Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351) established the first comprehensive Federal grant program intended to assist States and localities in strengthening and improving their criminal justice systems. Administered by the Law Enforcement Assistance Administration (LEAA), the Act provided block grants to the States with approved comprehensive criminal justice plans for law enforcement and criminal justice improvement projects. It also provided categorical grants for national programs, including research, technical assistance, training, statistics, and demonstration projects. Congress extended the LEAA authorization in 1970, 1973, 1974, 1976, and again in 1979, the current authorization.[4] With each reauthorization came amending language so that this period saw the LEAA change greatly in size and complexity.

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[1] See, Crime Control Act Hearings.

[2] See, *Justice Assistance Act of 1983,* Hearings before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 98th Cong., 1st Sess. (1983) (hereinafter cited as Justice Assistance Act Hearings).

[3] The Committee, in considering S. 53, adopted the text of title VIII of S. 829 (with only technical changes) as an amendment to S. 53 in the nature of a substitute. It then accepted additional amendments to that text. This title, therefore, consists of the text of title VIII of S. 829 and, with only minor variations, the additional amendments to that text adopted by the Committee at the time S. 53 was ordered favorably reported.

In 1975, annual appropriations for the LEAA State and local assistance program reached a peak of $895 million, and subsequently dropped sharply. Three months after the 1979 Act was signed into law, the Carter Administration proposed to phase-out LEAA by requesting no fiscal year 1981 appropriations for the State and local assistance effort. The LEAA was terminated on April 15, 1982.

The history of LEAA provides important lessons for use in the design of a new effort to attack the problem of crime. It demonstrates that a program whose priorities were unclear and constantly shifting resulted in confusion and waste. It also indicates that overly detailed statutory and regulatory specification produces bureaucratic red tape, which inhibits progress toward the goals of the program.

The LEAA experience also demonstrates that the concept of Federal seed money for carefully designed programs does work, and that certain carefully designed projects can have a significant impact on criminal justice.

In 1981, the Attorney General appointed a distinguished Task Force on Violent Crime. Building upon the recommendations of this Task Force [5] and the lessons learned from the LEAA experience, the Committee worked to establish a new and more targeted approach to Federal justice assistance in the 97th Congress.[6]

In September 1982, the Committee favorably reported S. 2411, the Justice Assistance Act of 1982. On December 9, 14, and 22, justice assistance legislation was considered and passed by the Senate. The final version of the Justice Assistance Act of 1982 was passed by both bodies on December 22 as part of a seven-part anti-crime package. That package was "pocket" vetoed on January 14, 1983, after the 97th Congress adjourned, due to the Administration's strong objections to another portion of that package.[7]

Following meetings with Chairman Thurmond, Senator Specter and Members of the House, the Administration agreed to endorse the concept of a highly targeted program of Federal financial assistance to State and local criminal justice efforts and proposed that it operate within a restructured organizational framework.

This Administration support was reiterated in the testimony of the Associate Deputy Attorney General in his statement before the Subcommittee on Juvenile Justice's hearings on Federal justice assistance.[8] The Subcommittee received testimony from many groups all of whom presented evidence to the Committee as to the critical need for a Federal role in State and local efforts to fight crime.[9]

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[4] The current justice assistance authorization for appropriations is found in the Justice System Improvement Act of 1979 (P.L. 96-157). For a more complete discussion of past authorization bills for this program, see S. Rept. No. 98-220, 98th Cong., 1st Sess. (1983).

[5] See, Attorney General's Task Force on Violent Crime, Final Report, chapter 3 (1981) (hereafter cited as Task Force Final Report).

[6] See generally, S. Rept. No. 97-587, 97th Cong., 2d Sess. (1982).

[7] President's Memorandum of Disapproval of H.R. 3963, 19 Weekly Comp. Pres. Doc. 47 (Jan. 14, 1983); 129 Cong. Rec. H1245 (daily ed. Jan. 25, 1983).

[8] Justice Assistance Act Hearings, *supra* note 2 (statement of Stanley E. Morris, p. 8).

On January 31, 1983, the Administration sent to the Congress its Budget Request for fiscal year 1984. Included within that request was $92 million for a criminal justice assistance program.[10]

STATEMENT

Title VI of this bill as adopted by the Committee is intended to respond to the violent crime problem which has been consistently shown to be a national one of major proportions, both in the number of violent crimes committed and in the public perception of crime as a leading personal concern. According to the FBI's "Crime Clock" for 1981, one violent crime is committed every 24 seconds and one property crime is committed every three seconds.[11] The *Figgie Report* found that 41 percent of Americans were "highly fearful" that they would become victims of violent crime.[12] An additional 29 percent were "moderately fearful." The news media have given sustained prominence to the problem of crime, heightening public awareness of its magnitude and sustaining the public's demand for effective action by government at all levels. While State and local governments shoulder the primary burden of dealing with violent crime, a Federal role is appropriate in order to coordinate and supplement State and local efforts.

Title VI of S. 1762 is for the most part a complete substitute for title I of the Omnibus Crime Control and Safe Streets Act of 1968. This substitute is made up of Parts A through N, with a varying number of sections in each part. Unless otherwise specified, references to parts and section numbers refer to the new title of the Crime Control and Safe Streets Act of 1968.

The provisions of this new title are designed to reflect an appreciation for the lessons of the LEAA experience by providing for a highly targeted program of assistance from within a streamlined and simplified organizational arrangement in the Department of Justice. It eliminates the burdensome comprehensive planning requirements in the current law and substitutes a simplified application process which will assure the delivery of Federal assistance with a minimum of red tape and delay. Under the LEAA program, States submitted detailed comprehensive criminal justice improvement plans as the basis for their use of Federal funds. This requirement led to annual State plans of extraordinary length for which up to $60 million of Federal funds were spent annually.

Under this bill, as reported, only a simplified two-year application is required. The applications will identify the eligible projects to be implemented, the State or local jurisdictions in which the project will be operated, and the source of funds required to match the Federal share of the cost. Once the application is reviewed for compliance with provisions of the Act, the block grant funds will immediately become available to the State, which is then obligated to distribute a fair share of the funds to local jurisdictions.

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[9] In addition to the Associate Deputy Attorney General, testimony was received from: the United States Conference of Mayors, National Association of Counties, National Sheriffs Association, International Association of Chiefs of Police, Police Executive Research Forum, National Association of Attorneys General, National District Attorneys Association, National Legal Aid and Defender Association, National Council of Juvenile and Family Court Judges, National Center for State Courts, American Bar Association, Consortium of Social Science Associations, SEARCH GROUP, Inc., Commission on Accreditation for Law Enforcement Agencies, National Neighborhood Coalition and several State and local law enforcement officials.

[10] For a more complete discussion of the history of the Justice Assistance Act of 1983, see S. Rept. No. 98-220.

[11] Federal Bureau of Investigation, United States Department of Justice, *Crime in the United States—1981*, 5 (1982) (Uniform Crime Reports).

[12] See generally, *The Figgie Report on Fear of Crime: America Afraid*, Chapter One (1980).

Title VI establishes an Office of Justice Assistance (OJA) within the Department of Justice, headed by an Assistant Attorney General. The Committee concluded that placing authority and responsibility for the entire State and local program at the level of an Assistant Attorney General enhances the stature of the organization and provides a clear line of authority and accountability.

Within the Office of Justice Assistance will be four separate units—the Bureau of Justice Programs (BJP), the Bureau of Criminal Justice Facilities (BCJF), the National Institute of Justice (NIJ), and the Bureau of Justice Statistics (BJS), each headed by a director appointed by the Attorney General. The Bureau of Justice Programs Director is required by section 202 to provide funds, technical assistance and training authorized under Parts E and F. Under sections 302 and 402, respectively, the National Institute of Justice and Bureau of Justice Statistics Directors have "such authority as delegated by the Assistant Attorney General to make grants, cooperative agreements, and contracts awarded" by their respective agencies. The Director of the Bureau of Criminal Justice Facilities is authorized to make grants for criminal justice facilities under section 703. The Committee anticipates that all directors will be responsible for the day-to-day management of their units and will have grant-making authority.[13] LEAA and the Office of Justice Assistance, Research, and Statistics would be abolished.

Advising the Assistant Attorney General would be a consolidated Justice Assistance Advisory Board appointed by the President. This Board, replacing the two separate boards advising the National Institute of Justice and Bureau of Justice Statistics, would consider the full range of criminal justice issues and policies, rather than the compartmentalized consideration of only research, only statistical programs, or only the financial assistance needs of the criminal justice community.

The National Institute of Justice sponsors research and development relating to crime, its causes, and how criminal justice agencies can better address it. Its programs support a broad range of research activities to help strengthen criminal justice operations, formulate policies for crime prevention and control, and develop a better understanding of criminal patterns and behavior. It also supports research on prediction and classification techniques, analyses of crime control policies, and the development of performance standards for criminal justice agencies. Moreover, the Institute translates the results of research and evaluation into operating techniques, tests promising new criminal justice programs and transfers information through training and dissemination to State and local officials. Institute research is conducted primarily by nongovernmental research organizations.

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[13] See, Justice Assistance Act Hearings, *supra* note 2 (statement of Stanley E. Morris, p. 8).

The Institute will continue to carry out these justice research activities in much the same manner as authorized under current law, although more effective coordination between the Institute and the three bureaus is expected to be achieved under the proposed organizational arrangement. Thus, the products of research and demonstration efforts by the Institute can be brought to bear directly on the financial and technical assistance activities of the other units.

The Bureau of Justice Statistics is the major Federal agency with responsibility for collecting, analyzing and reporting national statistics on crime and criminal justice. It sponsors national surveys and censuses, including the National Crime Survey of crime victimization and a survey of inmates of State correctional facilities. These and other surveys enable this bureau to provide statistical information on crime and criminal justice in the United States, including information relating to the nature and extent of crime in the nation, the number of crime victims and the extent of their injuries and property losses, the size and growth of the prison population, the extent of prison overcrowding, and other matters. It will continue to carry out these statistical activities in much the same manner as authorized under the current law.

The Committee feels that by placing the National Institute of Justice and the Bureau of Justice Statistics within the new structure of the Office of Justice Assistance, the overall coordination and resulting productivity of that branch of the Department of Justice will be enhanced. While the Committee recognizes the great value of research and statistics in this area and their productive results, current economic limitations on available resources and past experiences with bureaucratic complexity dictate the need for a more efficient and focused approach.

The Committee therefore concluded that while the day-to-day operation, research, and statistical responsibilities would remain with the individual bureau directors, the Assistant Attorney General could better coordinate the efforts of these branches of the Office. Because the directors will have practical experience in their fields and the bill clearly defines the duties and responsibilities of the various bureaus within the Office, the National Institute of Justice and the Bureau of Justice Statistics will be free to pursue their academic and statistical endeavors unfettered by any bureaucratic or political constraints. It is the Committee's belief that this new structure will reduce red tape and increase the overall productivity of the Office of Justice Assistance, without reducing the scientific integrity or autonomy of the Bureaus involved.

The Bureau of Justice Programs will have the responsibility to provide technical assistance, training and funds to State and local criminal justice and non-profit organizations through a combination of block and discretionary grant funds; 80 percent of the funds authorized to be appropriated are for the purposes of implementing a block grant program. Each State would receive an allocation of block grant funds based on its relative population. At least a proportional share of the funds must then be passed-through to local governments for program implementation with a priority to local jurisdictions on the basis of criteria to be established by the Director. Furthermore, should a State not qualify, or choose not to participate, local jurisdictions within the State shall be able to apply for and receive funds. A base amount of $250,000 will be awarded to each State with the remaining block grant portion allocated on the basis of each State's relative population.

Reported crime rate was not included as an allocation factor for three reasons. First, numerous jurisdictions, including some large cities and many small or rural communities, do not participate in the FBI's Uniform Crime Reports (UCR) data collection program. Second, the number of crimes reported to the police do not necessarily reflect either the actual rate of criminal acts or the level of public fear of crime in a particular locality. Finally, the use of crime rate data as a basis for the distribution of funds may penalize the more efficient and effective law enforcement agencies while rewarding the less effective.

Federal funds would be matched in cash on a 50-50 basis. Individual projects would not be entitled to receive more than three years of Federal assistance. Funding would be limited to specific types of activities based on program models with a demonstrated record of success, which relate primarily to violent crimes, repeat offenders, victim-witness assistance, and crime prevention projects. No Federal funds may be used to pay State or local administrative costs, nor may they be used for construction projects, personnel salaries or hardware, except as a necessary and incidental expense associated with an approved project.

Unlike the former Law Enforcement Assistance Administration program, which attempted to "improve the criminal justice system," at State and local levels, this bill focuses on those specific areas where modest resources can have a significant impact.[14] Past experience with the Law Enforcement Assistance Administration program is ample evidence of the need for a narrow focus to the financial assistance program in order to prevent dissipation of limited resources and to assure maximum impact on serious and violent crime.

Twenty percent of the funds authorized to be appropriated are for a discretionary grant program. The discretionary funds will focus on technical assistance, training,[15] and multi-jurisdictional or national programs related to the same priority objectives specified for the block grant funds. In addition, discretionary funds may be used for demonstration programs to test the effectiveness of new anti-crime ideas. Federal funding for such programs may be up to 100 percent of their cost.

This title eliminates the complex application submission and review procedures required under the earlier program. It retains only those administrative provisions necessary to the exercise of appropriate stewardship over public funds and to assure that the funds are being effectively used for the purposes identified in the

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[14] Those specific areas in which modest resources have had a significant impact are discussed in more detail in the Committee Report accompaning S. 53 (S. Rept. No. 98-220). They are: "Sting" Anti-fencing Projects, the Career Criminal Program, the Victim-Witness Assistance Program, the Treatment Alternatives to Street Crime (TASC) Program, Integrated Criminal Apprehension Program (ICAP), the Prosecutor's Management Information System (PROMIS), the New Pride and Violent Juvenile Offender Program, Anti-Arson Programs and Community Crime Prevention Programs.

[15] The training which might be funded under the discretionary grant program includes the type provided at the Federal Law Enforcement Training Center at Glynco, Georgia, the National Institute of Corrections training facility at Boulder, Colorado, and the FBI National Academy at Quantico, Virginia.

Act. In lieu of the establishment of a statutorily mandated State planning agency, it authorizes the chief executive of each State to designate a State agency to administer the grant program.

This title also establishes a new Bureau of Criminal Justice Facilities within the Office of Justice Assistance (Part G). The Committee believes that our dangerously overcrowded prisons and jails represent a serious threat to the stability and integrity of the Nation's law enforcement and justice systems. A Federal justice assistance effort must include direct and substantial aid to States struggling to renovate and rebuild a failing prison and jail infrastructure that represents their last line of defense against violent crime.[16]

During 1982 the National Governor's Association called for the Federal Government to make assistance for the construction of new prisons its number one criminal justice priority. The Attorney General's Task Force on Violent Crime recommended that Congress appropriate $2 billion over four years to help the States build prisons.[17] Governor James Thompson, co-chair of the Task Force, urged that most of the recommendations to combat violent crime would be to no avail for a nation left with no place to put violent offenders because of a lack of safe humane prison facilities.[18]

Our Nation's prisons and jails are teeming with inmates sleeping in tents, boilerrooms, gymnasiums, hallways and temporary trailer houses. Unsanitary and unsafe, many of our overflowing prisons no longer have the capacity to legally hold the burgeoning inmate populations created by our ever increasing war on crime. Wardens and jailers, as well as mayors and governors, face thousands of lawsuits challenging the right to hold prisoners under conditions that violate fundamental concepts of human decency. Thirty-nine States and hundreds of counties and city executives and law enforcement officers are under court order or are defending lawsuits because of substandard and inhumane prison and jail conditions.[19] The condition of our Nation's corrections infrastructure of more than 650 prisons, 3,500 jails, and numerous halfway houses, detention centers and other correctional facilities today represent the critically weak link in the Nation's battle against crime.

During the 1970's, while resources to detect, apprehend and prosecute criminals were expanding, expenditures for convicted and pretrial prisoners continued to decline in real terms. The capacity and efficiency of all criminal justice agencies increased, except corrections, leaving the Nation's last line of defense against crime with too many prisoners in too little space.

The new Bureau of Criminal Justice Facilities will direct new Federal financial and technical assistance to States and localities in their efforts to reduce dangerous and epidemic prison and jail overcrowding and other substandard conditions of confinement.

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[16] For additional views on correctional facility renovation and construction, see S. Rept. No. 98-220 (additional views of Senator Dole).

[17] Task Force Final Report, *supra* note 5, at 77.

[18] *The Criminal Justice Construction Reform Act*, Hearings before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess., 223, 224 (1981).

[19] ACLU National Prison Project, Status Report, March 1983.

The authorization for this program is capped at $25 million for each fiscal year 1984 through 1987.

The Bureau of Criminal Justice Facilities will render assistance in several important areas. It will (1) provide for subsidies to reduce interest costs on prison and jail bonds to help move necessary renovation and construction projects off the drawing boards; (2) authorize grants for developing State corrections master plans for renovation or construction projects to relieve unconstitutional and substandard prison and jail conditions; and (3) establish a state-of-the-art clearinghouse for criminal justice facilities with expert technical assistance for facility planning, design, construction and operations.

The Committee believes that Federal assistance should emphasize aiding State and local governments that are striving to bring their correctional facilities into compliance with Federal constitutional and other legal mandates. Since such mandates contemplate evolving standards of decency, assistance should also encourage efforts to meet local or nationally developed standards or accreditation requirements through the application of advanced practices.[20]

The vehicle serving as the application for assistance—the State corrections master plan—represents one of the most potent resources a State can marshall to combat substandard prison conditions and overcrowding. The application process itself encourages States to begin managing their prison problems in a proactive rather than reactive manner. No elaborate overlay of statutory or regulatory requirements are provided or intended to encourage such planning efforts. Application requirements are intended primarily to insure a modicum of fiscal accountability and encourage coordinated system-wide planning efforts. State plans concisely setting out correctional facility needs and describing legislative, executive, and judicial solutions being pursued in a construction and non-construction context will satisfy the purposes intended for such plans by the Committee.

The Committee believes that non-construction initiatives—such as developing corrections standards, seeking accreditation of institutions, sentencing reform, emergency overcrowding contingency plans, innovative classification plans, community corrections, enhanced prison education, industry and work release programs, and other strategies utilized by a number of States to enhance or supplant construction efforts to improve prison conditions and reduce overcrowding—should be encouraged as a concomitant to providing renovation or construction assistance.[21]

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[20] As developed by the American Correctional Association and the former National Clearinghouse on Criminal Justice Planning and Architecture, advanced practices are intended to make correctional facility designs more flexible, efficient, and responsive to environmental health, security, personal safety, basic human activity and other important institutional and societal purposes, and less reflective of obsolete designs relying almost exclusively on a maximum security hardware approach. Furthermore, in 1980, Congress granted the Department of Justice legal standing to intervene on behalf of prisoners suing State and local officials because of unconstitutional prison and jail conditions. Public Law 96–247, the Civil Rights of Institutionalized Persons Act, stated that "* * * where federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist." 94 Stat. 349, at 354.

[21] Many of the construction and non-construction strategies that States have been pursuing to reduce overcrowding are catalogued in the report *Reducing Prison Crowding: An Overview of Options*, National Institute of Corrections, submitted to the National Governors Association, February 21, 1982.

Title VI also provides for Federal assistance to State or local governments confronting an "uncommon situation in which State and local resources are inadequate to protect the lives and property of citizens or enforce the criminal law." The Attorney General is authorized to receive and approve or disapprove applications from the chief executive of any State for designation of a State or locality experiencing such a situation as a "law enforcement emergency jurisdiction." When the Attorney General finds that a jurisdiction qualifies for such designation according to criteria he is required to establish and publish, assistance may be provided by Federal agencies having law enforcement responsibilities. Federal assistance is defined as "equipment, training, intelligence information, and technical expertise." In addition, the Office of Justice Assistance may provide funds for the lease or rental of specialized equipment and other forms of emergency assistance, except that the funds may not be used to pay the salaries of local criminal justice personnel or otherwise supplant State or local funds.

The Committee anticipates that the emergency assistance provision could apply to such situations as the notorious Atlanta child murders, the Mount St. Helens volcanic eruption which disabled police vehicles and communications, and public safety planning for national political conventions and international events, such as the Olympic Games.

This title also reauthorizes the existing Public Safety Officers' Benefits Act with four modifications which are consistent with congressional intent as expressed in the legislative history of the 1974 Act. Specifically, it codifies a recommendation of the General Accounting Office regarding eligible beneficiaries under 5 U.S.C. 8101, establishes a definition of intoxication, and clarifies the prohibition against payment in instances of gross negligence and voluntary intoxication.

Finally, this title extends the original prison industry enhancement certification authority enacted in the Justice System Improvement Act of 1979 from 7 to 20 projects. The 1979 Act authorized the Law Enforcement Assistance Administration to designate seven projects for exemption from Federal laws prohibiting the sale of prisoner-made goods to the Federal Government and the placement of those goods in interstate commerce. 18 U.S.C. 1761(a). The seven authorized certifications have been issued and early evaluations indicate that the designated projects have been successful in teaching inmates marketable job skills, reducing the need for their families to receive public assistance, decreasing the net cost of operating correctional facilities, and breaking the recidivist cycle. The Committee believes a modest expansion of the program to 20 projects will permit willing and able corrections facilities to participate in the program and will allow the Department to better evaluate which prison industry projects best accomplish the goals of the program.

SECTION-BY-SECTION ANALYSIS

Section 601 of the bill, in effect, repeals Title I, of the Omnibus Crime Control and Safe Streets Act of 1968, as amended to date, and substitutes a completely new title. The new title is discussed below.

PART A—OFFICE OF JUSTICE ASSISTANCE

Section 101 establishes an Office of Justice Assistance in the Department of Justice, headed by an Assistant Attorney General appointed by the President with the advice and consent of the Senate and under the general authority of the Attorney General.

Section 102 describes the role of the Assistant Attorney General, who has authority over the activities carried out under this Act and is responsible for coordination and provision of staff support and services to the units established under this title. The responsibilities of the Assistant Attorney General include dissemination of information, coordination with State and local governments, and cooperation with State and local criminal justice agencies and officials. The Assistant Attorney General is expected to serve as the focal point for communications with the Department of Justice from State and local criminal justice agencies and to function within the Department as an advocate for the interests and needs of State and local criminal justice.

Section 103 establishes a Justice Assistance Advisory Board of not more than 21 members appointed by the President and sets qualifications for members. The Board is authorized to make recommendations to the Assistant Attorney General concerning program priorities of the operating units and to provide such advice as is appropriate. The Board replaces the separate advisory Boards to the National Institute of Justice and Bureau of Justice Statistics, with the objective of establishing a single advisory body capable of making recommendations pertaining to the full range of State and local criminal justice concerns rather than the limited viewpoints of only research or only statistical issues.

PART B—BUREAU OF JUSTICE PROGRAMS

Section 201 establishes a Bureau of Justice Programs within the Office of Justice Assistance. The Bureau is to be headed by a Director appointed by the Attorney General.

Section 202 describes the duties and functions of the Bureau of Justice Programs (BJP) and its Director. It authorizes the provision of financial and technical assistance and training to State and local criminal justice agencies and private nonprofit organizations through block and discretionary grants. It provides authority to make grants and enter into contracts and interagency agreements and requires the Director to establish priorities in accordance with specified criteria. The Director is called upon to foster local participation in technical assistance and training programs, and to encourage the targeting of State and local resources on activities directed toward violent crime and the apprehension and prosecution of repeat offenders.

PART C—NATIONAL INSTITUTE OF JUSTICE

Section 301 describes the purpose of the National Institute of Justice, which is to provide for and encourage research and demonstration efforts designed to improve Federal, State and local criminal justice systems and related aspects of the civil justice system, prevent and reduce crime, insure citizen access to dispute-resolution forums, improve efforts to detect, investigate and prosecute white-collar crime and public corruption, and identify programs of demonstrated success.

Section 302 establishes the National Institute of Justice within the Office of Justice Assistance to be headed by a Director appointed by the Attorney General. The Institute is authorized to make grants and enter into contracts for a variety of research and development purposes relating to crime and criminal justice.

Section 303 authorizes the Institute to make grants and enter into contracts for up to 100 percent of project costs.

PART D—BUREAU OF JUSTICE STATISTICS

Section 401 indicates that the purpose of this Part is to provide for the collection and analysis of statistical information on crime, juvenile delinquency and the operation of the criminal justice system and related aspects of civil justice system and to encourage the development of information and statistical systems programs at the Federal, State and local levels.

Section 402 establishes the Bureau of Justice Statistics within the Office of Justice Assistance to be headed by a Director appointed by the Attorney General. It authorizes the Bureau to make grants and enter into contracts for a variety of statistical collection and analysis purposes involving crime, juvenile delinquency and criminal justice systems at Federal, State and local levels, and to assist the development of information and statistical systems programs and capabilities at State and local levels.

Section 403 authorizes the Bureau to make grants and enter into contracts for up to 100 percent of project costs.

Section 404 directs that data collected by the Bureau shall be used only for statistical or research purposes and shall be gathered in a manner that precludes use for law enforcement or other purposes relating to a particuar individual.

PART E—STATE AND LOCAL ALLOCATIONS

Section 501 indicates that the purpose of this Part is to assist States and local governments to establish programs of proven success or that have high probability of improving criminal justice systems and which focus primarily on violent crime and serious offenders. It authorizes the Bureau of Justice Programs to establish criteria and make grants to States for twelve enumerated program activities plus an additional category authorizing programs which have been certified by the Director as likely to prove successful and address additional critical problems of crime.

Section 502 limits the duration of Federal financial assistance under this Part to not more than three years and limits the Federal share of any grant to a State under this Part to 50 percent of the cost of programs or projects specified in the application. It directs that the non-Federal share must be in cash. It also provides that the Federal share may be increased in the case of grants to Indian tribes or other aboriginal groups under certain circumstances.

Section 503 articulates application requirements, including the stipulation that the application must set forth programs for a two-year period which meet objectives of Section 501 and must designate which Section 501 objective will be achieved by each program. It also provides that certain specific assurances must be included in the application, including a pledge to submit an annual performance report, assessment of the impact of funded activities and certification that Federal funds will not be used to supplant State or local funds. It requires other assurances concerning fund accounting, maintenance of data and equipment use.

Section 504 directs that the Bureau shall provide financial assistance to each State applicant if its application is consistent with the requirements of this title and with priorities and criteria of section 501. It also directs that an application will be deemed approved unless the Bureau informs the applicant of reasons for disapproval within 60 days of its receipt. It gives the Bureau authority to suspend funding for that part of a program that has failed to meet this title's objectives. It prohibits the use of grant funds under Parts E and F for certain enumerated purposes, including general salary payments and construction projects. It gives an applicant under this Part the right of notice and an opportunity for reconsideration under section 802 before final disapproval of the application.

Section 505 provides that of the total sum appropriated for Parts E (block grants) and F (discretionary grants), 80 percent will be for Part E and 20 percent for Part F. It sets allocation and distribution requirements, including the provision of a $250,000 base amount to each State and the pass-through of funds to local units of government at least proportionate to the relative local expenditures for criminal justice. Inasmuch as most authorized activities under Section 501 are carried out by local jurisdictions, the States are encouraged to pass through to local governments the maximum amount of available funds.

Section 506 specifies that the chief executive of each participating State will designate an office to administer its block grant funds. States are not required to establish an administrative entity by statute, as required under current law, inasmuch as Federal program funds may not be used to pay the State or local administrative costs. Thus, States are afforded maximum discretion in providing appropriate stewardship of block grant funds.

PART F—DISCRETIONARY GRANTS

Section 601 authorizes a discretionary program to provide financial assistance, in amounts up to 100 percent of program or project costs, to States, units of local government, and private nonprofit organizations for specific activities, including demonstration programs, education, training and technical assistance, national or multi-State efforts which address the 12 activities enumerated in section 501, and the development of standards and voluntary accreditation processes.

Section 602 requires the Bureau to establish annual funding priorities and selection criteria for discretionary grants and provides for prior notice and opportunity for public comment.

Section 603 specifies certain programmatic and certification requirements for applications for discretionary funding, including the provision for evaluation in order to determine the impact of the program or project and its effectiveness in achieving the stated goals. It requires that nonprofit organizations include evidence of consultation with appropriate State and local officials.

Section 604 limits financial assistance to programs or projects funded under this Part to not more than three years, with certain exceptions.

PART G—CRIMINAL JUSTICE FACILITIES

Section 701 establishes the Bureau of Criminal Justice Facilities (BCJF) within the Office of Justice Assistance. This Bureau is headed by a director appointed by the Attorney General. The section also prohibits the Director from engaging in other employment or holding any position with organizations with which the Bureau of Criminal Justice Facilities has any dealings in order to prevent conflicts of interest.

Section 702 directs the Bureau of Criminal Justice Facilities to make grants to States to aid in the construction and modernization of correctional facilities which are defined in section 709. The Bureau of Criminal Justice Facilities, in conjunction with the duties outlined in section 707, shall also provide for the widest practical and appropriate public dissemination of information obtained from the programs and projects assisted by the Bureau of Criminal Justice Facilities. Such information should emphasize evaluative data on the relative successes of various proven and promising construction and non-construction initiatives aimed at reducing correctional facility overcrowding and improving substandard conditions of confinement.

Section 703 authorizes the Director of the Bureau of Criminal Justice Facilities to make grants for the renovation and construction of correctional facilities beginning October 1, 1984 and ending September 30, 1987.

Section 704 allocated appropriate funds. The Director of the Bureau of Criminal Justice Facilities shall allocate no more than 3 percent of appropriated funds each year to Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands and the Northern Mariana Islands according to their respective needs and efforts pursuant to sections 705 and 706.

Of the funds remaining for the States, one-half is allocated based on population and the remaining half is to be allocated considering relative correctional facility needs and efforts as established in approved State plan applications.

In determining relative needs of each State, the Director is required to consider whether overcrowding or facility conditions violate constitutional or statutory standards and the amount and type of assistance required to bring a facility into compliance with the law.

The size, density, and nature of an inmate population are also factors that are to be considered by the Director in determining the relative needs of a given State. As an example, older inmate populations and those serving long sentences place heavy demands on certain institution resources, such as medical services. The courts have placed a strong emphasis on staffing, inmate health, safety, activity, and access to exercise and other program areas in relation to number of hours per day inmates are confined in locked cells, to determine whether a facility is considered legally overcrowded. Double celling situations—which have been ruled constitutional by the courts for prisoners confined in new, well-staffed facilities where prisoners spend most of their time out of their cells in program or day room areas—may not be tolerable in an older institution lacking adequate staffing or programs for inmates.

In allocating assistance, the Committee emphasizes that the Director give priority to the needs of States which have demonstrated that they have implemented, or are in the process of implementing, significant legislative, executive or judicial non-construction, as well as construction, initiatives to reduce overcrowding or improve conditions of confinement.

Section 705 governs the State Applications Plan. The Bureau of Criminal Justice Facilities will promulgate administrative rules to implement the purposes of this Part. States seeking assistance shall submit a five year State needs assessment and action plan as an application, supplemented as necessary with annual revisions.

State plans are to (1) provide that the program be administered by a State agency which generally represents State and local correctional interests; (2) contain a comprehensive statewide program plan which sets out needs, priorities, and construction and non-construction action plans to relieve overcrowding and improve confinement conditions in corrections facilities; (3) assure that grant funds and property derived from such funds will be administered, held and controlled by a public agency to be used for the purposes provided by this Part; (4) provide assurances that State or local government will, after a reasonable period of Federal assistance, pay, with non-Federal funds, any remaining or continuing construction, non-construction, or program costs of assisted projects; (5) provide assurances that, to the extent practical, correctional facilities will be used for other criminal justice purposes if they are no longer used for the specific purpose for which they were built; (6) assure that the State will take into account the needs and requests of local government and encourage the development of local projects; (7) provide for an appropriately balanced allocation of funds between State and local governments based on requests and relative need; (8) provide for appropriate executive and judicial review of actions taken by the State agency concerning applications or the awarding of funds to local government; (9) assure that the assistance allocated under this Part will not supplant but augment State or local funds; and (10) assure that the State is making diligent efforts consistent with public safety, to reduce overcrowding and improve programs and conditions of confinement in corrections facilities.

Section 706 requires basic criteria to be established by the Bureau of Criminal Justice Facilities to generally establish project priorities. The States should be accorded wide discretion in determining the priority of various projects and generally should consider (1) the relative needs of an area within the State for facility assistance necessary to bring existing facilities into compliance with

Federal or State law; (2) the relative ability of a local agency to support a correctional facility construction or modernization program; and (3) the extent to which a project contributes to an equitable distribution of assistance within the State.

Section 707 provides for a clearinghouse on the construction and modernization of criminal justice facilities. The Director of the Bureau of Criminal Justice Facilities is authorized to enter into contracts with public agencies or private organizations to operate a clearinghouse on the construction and modernization of correctional facilities. The clearinghouse will develop, collect, and disseminate state-of-the-art information on construction and modernization of correctional facilities. Since the Law Enforcement Assistance Administration funding of the National Clearinghouse for Criminal Justice Planning and Architecture ended in 1979, there has been no comparable Federal research in criminal justice program planning and correctional facility responses.

Section 708 authorizes the Secretary of the Treasury to pay to State or local governments amounts necessary to reduce the cost of bond interest payments to five percent for qualifying issue obligations to finance the renovation or construction of corrections facilities. Payments are made only on the application of the issuer consistent with the criteria established for allocating funds under sections 705 and 706. If the issue includes the financing of a facility which includes non-corrections components, such as a public safety center, such project qualifies for assistance when substantially all of the proceeds are to be used to finance the corrections component of the project. Payments for qualifying issues may be made by the Secretary, in consultation with the Director, in advance, by installment and on the basis of estimates.

A State may receive a combination of grants and bond interest subsidies equal to, but not in excess of, each State's formula allocation. The subsidization of bond interest payments shall not affect the status of any obligation under section 103 of the Internal Revenue Code of 1954 governing excludability of governmental bond interest income nor shall it cause the interest on such an issue to be excludable only in part under section 103.

Many jurisdictions faced with the critical need to renovate or replace antiquated prison or jail facilities have had close votes at the polls to approve correctional facility bond issues. Relatively modest interest subsidies will serve to support a significant number of prison or jail renovation or construction projects and enhance the likelihood that needed projects will be approved.

Section 709 broadly defines the term correctional facility to include any prison, jail, reformatory, work farm, detention center, pretrial detention facility, community based correctional facility, half way house, or any other institution designed for the confinement or rehabilitation of persons charged with or convicted of any criminal offense, including juvenile offenders. Construction, as used in this Part, not only includes construction in its usual sense, but facility remodeling, extension, or acquisition, and the preparation of drawings and specifications for facilities for which bond interest subsidies or grant assistance would be available. The inspection and supervision of construction are also included in the definition of construction. The term does not include interests in land or off-site improvements.

PART H—ADMINISTRATIVE PROVISIONS

Section 801 authorizes the Attorney General to establish rules, regulations, and procedures for the activities authorized under this title.

Section 802 gives the Office authority for grant termination and fund suspension for noncompliance with law, regulations or grant terms. It establishes the authority and procedures in the Office for reconsideration of termination of a grant under this title.

Section 803 specifies the Office's final authority in determinations, findings and conclusions under the title.

Section 804 grants the Office subpoena power and authority to hold and conduct hearings to discharge its duties under the title.

Section 805 gives the Office the personnel and administrative authority to fulfill its functions and duties under the title.

Section 806 specifies that title to personal property purchased under this title shall vest in the agency or organization purchasing the property if it certifies it will be used for criminal justice purposes. If there is no certification, title vests in the State office with property to be used for criminal justice purposes.

Section 807 disclaims any interpretation of this title to authorize agency or employee direction or control over any police force or other State or local criminal justice agency.

Section 808 prohibits discrimination on the basis of race, color, religion, national origin, or gender in connection with any program funded under this title. It provides a basis for civil action by the Attorney General and suspension of funds by the Office.

Section 809 establishes recordkeeping requirements for the recipients of funds and gives authority to the Office and the Comptroller General to conduct audits.

Section .810 continues provisions for the confidentiality of data and information collected, stored, maintained, or disseminated with support under this title, including authority of Office to establish standards to protect confidentiality and individuals' privacy and constitutional rights.

PART I—DEFINITIONS

Section 901 provides definitions of terms, including "criminal justice," "unit of local government," and "criminal history information."

PART J—FUNDING

Section 1001 provides appropriation authority through Fiscal Year 1987 to carry out the activities of the Office of Justice Assistance, National Institute of Justice, Bureau of Justice Statistics, Bureau of Justice Programs, and Bureau of Criminal Justice Facilities, and permits funds to remain available for obligation until expended. It authorizes such sums as necessary for the Public Safety Officers' Death Benefits and Emergency Federal Assistance programs. It provides such sums as are necessary for the Bureau of

Criminal Justice Facilities under Part G for years ending September 30, 1984, 1985, 1986, 1987, but also provides that under no circumstances shall those sums exceed $25 million dollars in any year.

PART K—PUBLIC SAFETY OFFICERS' DEATH BENEFITS

Section 1101 provides for payment of $50,000 to prescribed survivor of public safety officer who dies from personal injury sustained in the line of duty. It establishes certain administrative procedures.

Section 1102 establishes the same limitations on the payment of benefits under this title as under current law, and clarifies exceptions in prior legislative history that voluntary intoxication or gross negligence by officer at time of death will bar benefits.

Section 1103 defines terms pertaining to eligible recipients of the benefit payment and establishes the definition of the term "intoxication" for the purposes of this Part.

Section 1104 authorizes the Office to establish such rules and regulations as are necessary to carry out the purposes of this Part.

Section 1105 provides that the United States Claims court shall have exclusive jurisdiction over these claims.

PART L—FBI TRAINING OF STATE AND LOCAL CRIMINAL JUSTICE PERSONNEL

Section 1201 authorizes the FBI Director to establish and conduct training for State and local criminal justice personnel at the FBI Academy at Quantico and to assist in conducting local and regional training programs at the request of a State or unit of local government.

PART M—EMERGENCY FEDERAL LAW ENFORCEMENT ASSISTANCE

Section 1301 authorizes the Attorney General to receive from the chief executive of any State an application for designation as a "law enforcement emergency jurisdiction." The application will be evaluated according to criteria established by the Attorney General and published in the *Federal Register*.

Section 1302 provides that, if an application for emergency designation is approved, Federal agencies are authorized to provide assistance for the duration of the emergency. Costs of such assistance may be paid by the Office of Justice Assistance from funds specifically appropriated for emergency purposes. The Office of Justice Assistance may also provide technical assistance, funds for the lease or rental of specialized equipment, and other forms of emergency assistance, except that no funds may be used to pay the salaries of local criminal justice personnel or otherwise supplant State or local funds. The Federal share of emergency assistance may be up to 100 percent of project costs.

Section 1303 defines certain key terms. "Federal law enforcement assistance" is defined as "equipment, training, intelligence information, and technical expertise." "Law enforcement emergency" means an uncommon situation in which State and local resources are inadequate to protect the lives and property of citizens or enforce the criminal law.

Section 1304 provides that the recordkeeping and administrative requirements applicable to other Office of Justice Assistance activities shall apply also to the emergency assistance program.

PART N—TRANSITION

Section 1401 provides for the continuation of rules, regulations and instructions in effect at time of enactment. It permits the Assistant Attorney General to obligate unused or reversionary funds previously appropriated.

OTHER SECTIONS OF TITLE VI OF S. 1762

Section 602 of S. 1762 changes references in other laws to the Office of Justice Assistance, Research, and Statistics and Law Enforcement Assistance Administration to "Office of Justice Assistance."

Section 603 provides for compensation of the various Directors.

Section 604 expands the previous Law Enforcement Assistance Administration prison industry certification program from 7 to 20 projects and places authority in the Office of Justice Assistance. This section also exempts prisoner-made goods produced in a certified project from the restriction of 49 U.S.C. 11507 and 41 U.S.C. 35.

TITLE VII—SURPLUS FEDERAL PROPERTY AMENDMENTS

INTRODUCTION

Title VII of this bill authorizes the donation of surplus Federal property to any State for the construction and modernization of criminal justice facilities. It is designed to make it easier for the Federal Government to transfer to the State and local governments surplus Federal property for use by the transferee for the care or rehabilitation of criminal offenders. This title is substantially the same as S. 1422 as reported by the Senate Committee on Governmental Affairs last Congress [1] and as passed by the Senate on May 26, 1982.[2] The provisions are in accord with recommendation No. 56 of the Attorney General's Task Force on Violent Crime, which cited the transfer of surplus property for this purpose as a "significant opportunity for Federal involvement in easing State and local correctional facility overcrowding." [3]

Substantially the same considerations supporting the establishment of a new Bureau of Criminal Justice Facilities in title VI of this bill [4] support this surplus property program. As noted by the Committee on Governmental Affairs: [5]

> Prison overcrowding is a problem rapidly reaching crisis proportions. The United States prison population expanded in the first six months of 1981 at more than double the rate of 1980. Since 1976, the population has increased by 50 percent.
>
> One of the forces driving the higher incarceration rate is the increase in violent crime, and the public reaction to such crimes. The number of inmates who committed crimes against persons was between 40 and 60 percent in 1980, an increase of more than 100 percent in ten years. Many states have responded to increasing violence by passing mandatory sentencing laws, many of which disallow parole. These longer sentences and a higher rate of prosecutions and convictions have severely strained prison capacity. Since 1975, the prison population has grown by 55 percent, while cell space has lagged behind at about 25 percent growth over the same period.
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> Another factor behind the growth in prisoners has been the rise in the general population between the ages of 18 and 25, where criminal activity is historically most

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[1] S. Rept. No. 97-322, 97th Cong., 1st Sess. (1982).

[2] 128 Cong. Rec. S6119 (daily ed.). An identical bill introduced this Congress (S. 329) is pending in the Governmental Affairs Committee.

[3] Attorney General's Task Force on Violent Crime, Final Report, p. 79 (1981).

[4] See, Part G of title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by section 601 of this bill, and related discussion in this report.

[5] S. Rept. No. 970322, *supra* note 1, at 1-2.

> common. Between 1975 and 1980, the 18-25 year old population increased by 9.1 percent compared to a 5.4 percent increase overall. Crime statisticians forecast that the baby boom following the Korean War will keep the number of offenders high through the 1980's.
>
> Prison construction has not kept pace. State and local correctional systems have failed to finance and construct new facilities fast enough to accommodate increasing prison populations. Part of the reason for the lag are high construction and operating costs. Maximum security prisons cost between $75,000 and $95,000 per cell. Medium security construction averages between $50,000 and $60,000 per cell. Annual operation costs vary around $10,000 per offender.
>
> Over half of the States are under court order to reduce overcrowding, yet are faced with a 5-7 year delay from time of prison financing to time of activation. Many States have had to resort to a variety of short-term arrangements to meet their needs. These include double celling and housing inmates in tents or prefabricated buildings or in space previously allocated to other uses. In addition to having space shortages, many prisons are antiquated: too large to operate efficiently, unsafe and understaffed. The Justice Department estimates that 43 percent of all prisoners are being housed in facilities built before 1925.
>
> While mounting public concern has produced stiffer parole policies and less frequent use of incarceration alternatives such as probation, judges recently have begun to respond to the severity of prison overcrowding by a greater willingness to use such options. This has increased the possibility that some defendants who should be incarcerated remain at large.

The Committee on the Judiciary concurs with the Committee on Governmental Affairs that the problems raised by prison overcrowding are of such a serious and urgent nature to justify adding correctional facilities to the small group of activities which enjoy public benefit disposal preference—even though this participation dilutes the pool of property available to other non-Federal recipients. However, it should be stressed that, in implementing this title, the Department of Justice and the General Services Administration should fully appreciate the sensitivities involved in national law enforcement needs vis-a-vis other local land use interests with respect to surplus Federal real property. Accordingly, administrative procedures should be adopted and designed to make sure that (1) Federal real property is appropriately used consistent with its existing physical characteristics, thereby providing States and localities the full benefit of the Federal Government's investment in the property; and (2) decisions between correctional use proposals and competing proposals will be reserved to the Administrator of General Services so that the merits of each will be fully and promptly considered on the basis of the overall national interests involved.

DONATION OF SURPLUS FEDERAL PROPERTY

1. Present Federal law

The Federal Property and Administrative Services Act of 1949 provides the statutory means for the disposal of most Federal real property which Federal agencies find is no longer required for their needs and the discharge of their responsibilities. Under the Act, this property is reported to the General Services Administration, whereupon it is deemed "excess" and is subject to utilization by other executive agencies. When the Administrator of GSA determines that the property is not required by any other Federal agency, it is deemed "surplus" and disposed of in accordance with specific authorities provided in the Act.

A number of these authorities (referred to as public benefit disposals) provide for conveyances to State and local governmental units and eligible non-profit organizations for such purposes as airports, hospitals, schools and recreational areas at no cost or at a substantial monetary discount. Under these authorities, the Administrator is authorized at his discretion to donate surplus real property for one of these purposes to the eligible recipients upon receiving a favorable recommendation from the Federal agency (such as the Department of Education, the Department of Health and Human Resources, etc.) which determines the eligibility of the proposed recipient and evaluates the program of use. The effect of this title would be to add correctional facilities to this list of public benefit disposals for surplus Federal property and to authorize the Administrator of GSA to donate such property to States and localities for correctional uses upon the recommendation of the Attorney General.

2. Provisions of the bill, as reported

The bill amends section 203 of the Federal Property and Administrative Services Act of 1949 to provide for the donation of surplus real and related personal property for correctional use. States and their instrumentalities and subdivisions, Commonwealths and Trust Territories would be eligible to receive such property. In keeping with safeguards contained in other public benefit conveyance authorities, property donated under this measure will revert to GSA at the discretion of the Administrator in the event of inappropriate use.

Section 701 of this title amends section 484 of title 40, United States Code, by adding a new subsection (p) immediately at the end thereof.

Paragraph 484(p)(1) authorizes the Administrator to transfer to the States, the District of Columbia, the Trust Territories and the Commonwealths, or to any political subdivision or instrumentality thereof, surplus property determined by the Attorney General to be required for correctional facility use by the recipient. Property shall be used only under a program or project for the care or rehabilitation of criminal offenders as approved by the Attorney General. Transfers or conveyances shall be made without payments to the United States.

An appropriate program or project may be any State correctional agency, county jail, halfway house, work-release facility, training facility prison support service or any activity directly contributing to the care or rehabilitation of criminal offenders.

Surplus real property substantially comprised of facilities formerly used by the Federal Government for correctional purposes should be reviewed by the General Services Administration, with the Department of Justice prison needs clearinghouse, in consultation with affected States and local governments, for the purpose of correctional facility use only. The prison needs clearinghouse is located in the Federal Bureau of Prisons and was created in August 1981 to assist States in their efforts to obtain surplus Federal property for correctional use. Under this legislation, the clearinghouse will be the agency through which the Attorney General screens proposed conveyances and makes his recommendations to the Administrator of GSA. Prior to making his recommendation, the Attorney General shall determine that the applicant has provided for the consideration of local views with regard to the request for conveyance of this property.

If upon completion of his review, the GSA Administrator determines that no proposal is properly justified in light of the nature or value of the property, or if no application is received, the property should then be made available for other purposes authorized by the Federal Property Act and related legislation.

Second, with respect to surplus real property not previously used for correctional purposes, such property should be screened among all authorized recipients for uses generally provided by the Federal Property Act and related legislation, in accordance with normal surplus property procedures. These properties should be screened with the clearinghouse. Should any application for correctional use be received together with applications for other purposes, the selection of the grantee will be reserved to the Administrator of General Services on the basis of the justification submitted with the application. The merits of each should be considered in light of all factors affecting use, including adaptability of the property for correctional purposes, its importance for these purposes, the benefits to be derived from other uses, and the character and value of real property.

Paragraphs 484(p) (2) and (3) are amendments authorizing GSA to place such conditions and reservations upon the deed of conveyance as are necessary to protect the interests of the United States and the transferee.

Paragraph (2) provides for reversion of the property to the United States at the option of the Government in the event of use inconsistent with the purpose for which originally furnished. While the Administrator of GSA shall make the final determination, this provision is not intended to preclude use of the property for some complementary purpose so long as that purpose is clearly secondary and is consistent with the correctional objective for which the property was transferred.

Subparagraph (3)(A) authorizes the Administrator to determine and enforce compliance with the terms of any transfer agreement.

Subparagraph (3)(B) empowers the Administrator to reform, correct or amend any transfer agreement in order to satisfy legal requirements in existence at the time of the transfer. This provision does not authorize GSA to attach additional terms or restrictions to any transfer agreement as a result of a law, regulation, or policy determination not in existence at the time of the transfer.

Subparagraph (3)(C) further authorizes the Administrator to grant releases from a transfer agreement or any of its terms, or to yield any right or interest previously reserved to the United States, if he determines that the property no longer serves the purpose for which it was transferred or that such release or quitclaim will not prevent accomplishment of that purpose. The Committee is aware that, subsequent to the transfer, occasions may arise upon which the recipient will have a legitimate need to change the terms of a deed.

For example, property located on Blyth Island, Georgia, conveyed to the State of Georgia for park and recreational purposes was reconveyed to Glynn County for similar use. The restrictions requiring park use by the State were released so that the property could be conveyed to the county allowing an approved recreational program while imposing the original park use restrictions on the county.

One of the purposes of this section is to provide GSA with flexibility to accommodate these needs while protecting the interests of the Federal Government as originally intended. This section also gives the Administrator of GSA discretion to release recipients from all obligations to the Government concerning transferred property when the Administrator determines that such property can no longer be economically used for the original purpose, and when it is not economically feasible or practical for the Government to exercise its right of reversion.

Section 702 of this title amends section 484(o) of title 40, United States Code, as amended, by revising the first sentence. The revision requires the Administrator to make an annual report to Congress on the total acquisition value of all personal and real property transferred pursuant to subsection (p) of this section. This provision extends to public benefit conveyances for correctional purposes the congressional monitoring requirement now in effect for all other categories of public benefit conveyance.

TITLE VIII—LABOR RACKETEERING AMENDMENTS

IN GENERAL AND PRESENT FEDERAL LAW

The purpose of title VIII of this bill is to afford unions and employee benefit plans greater protection from corrupt union and management officials by increasing the penalties for violating portions of three statutes—the Labor Management Relations Act of 1947, known as the Taft-Hartley Act; the Employee Retirement Income Security Act of 1974, known as ERISA; and the Labor-Management Reporting and Disclosure Act of 1958, known as the Landrum-Griffin Act.[1]

Current Federal prohibitions and penalties designed to protect the legitimacy of labor relations have, in certain respects, proved to be inadequate. For example, while section 302 of the Taft-Hartley Act prohibits, among other things, the buying and selling of labor peace, violation of this prohibition is at present only a misdemeanor subject to a fine of up to $10,000 and imprisonment of no more than one year or both. These sanctions need to be made more firm. At the same time, the Committee recognizes that a wide range of Taft-Hartley section 302 violations do not involve payoffs or bribes, but simply fail to meet the detailed requirements for certain exemptions under section 302(c). The requirements for a criminal conviction under Taft-Hartley section 302 (c)(4) through (9) should be tightened to draw a clear line between violations properly deemed criminal wrongs—payoffs and bribes—and those violations properly deemed to be civil wrongs.

ERISA currently contains a list of crimes that disqualify an individual from holding a position of responsibility with an employee benefit plan. The maximum period of disqualification at present is five years. The operative date of disqualification is the date of the judgment of the trial court or the date on which that judgment is sustained upon appeal, whichever is later. It is necessary to move to ensure that any felony involving the abuse or misuse of a position with an employee benefit plan leads to the debarment of the individual convicted. Additionally, the list of positions to which the disqualification currently applies is too narrow, and the five-year debarment period is often too short, to prevent convicted officials from reasserting their influence over a benefit plan. Moreover, allowing convicted officials to retain their positions while the convictions are being appealed (a period sometimes exceeding two years) only encourages further crime and jeopardizes employee benefits.

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[1] Title VIII of this bill, with one exception, is identical to S. 336 as passed by the Senate by a vote of 75 to 0 on June 20, 1983 (129 Cong. Rec. S8735 (daily ed.)). Section 5 of S. 336—dealing with the authority of the Secretary of Labor to investigate and refer civil and criminal violations of the Employee Retirement Income Security Act and related Federal laws—is not included within title VIII. See, S. Rept, No. 98-83, 98th Cong., 1st Sess. (1983). The subject matter of this title is within the jurisdiction of the Governmental Affairs Committee and the brief summary here is an overview of the report of that Committee. See, *id* at 7-19.

The provisions of the Landrum-Griffin Act addressed by this title parallel the provisions of ERISA that this title amends. Again, the list of crimes that bring disqualification needs to be augmented; also, the debarment period and the method for fixing the operative date of disqualification suffer the same defects as do the similar ERISA provisions. Here, too, the list of positions to which disqualification applies must be expanded; convicted officials disqualified from one position have been kept on the payroll in another category, such as chauffeur, and have immediately moved back into positions of power once the disqualification period ends.

THE PROVISIONS OF THE BILL, AS REPORTED

Section 801 of title VIII amends section 302(d) of the Taft-Hartley Act to provide that willful violations involving labor bribery or a payoff of an amount in excess of $1,000 shall be a felony punishable by a fine of not more than $15,000 or imprisonment for not more than 5 years, or both. Crimes involving amounts of less than $1,000 would continue to be misdemeanors subject to the current penalties of $10,000 or one year imprisonment, or both.

Title VIII grants special treatment to transactions addressed by subsections 302(c) (4) through (9). These subsections contain exceptions, often technical in nature, to the prohibitions contained in sections 302 (a) and (b). Because a person can violate a prohibition of sections 302 (a) and (b) even though he proceeded in the belief that his conduct fell within the excepted behavior of sections 302(c) (4) through (9), title VIII adds to the "willful" requirements for this behavior the additional element that such conduct be "with intent to benefit himself or to benefit other persons whom he knows are not permitted to receive such payment, loan, money or other thing of value under subsection (c)(4) through (c)(9)."

A violation of Taft-Hartley sections 302(c) (4) through (9) which is "willful" and committed with the requisite "intent," and which involves an amount in excess of $1,000, is a felony punishable by a fine of not more than $15,000 or imprisonment for not more than 5 years, or both. If the amount involved is $1,000 or less, then violations remain misdemeanors subject to a fine of not more than $10,000 or one year imprisonment, or both.

Section 801 also amends Taft-Hartley section 302(e). The amendments provide civil jurisdiction in the United States district courts over suits brought by the United States alleging specific violations of Taft-Hartley and over suits brought by any person directly affected by an alleged violation of section 302. It preserves the jurisdiction of such courts to restrain violations under the Act.

Section 802 amends section 411(a) of ERISA, which prohibits persons convicted of certain crimes from serving in listed positions with an employee benefit plan. Added to this list of crimes are those offenses relating to abuse or misuse of such person's employee benefit plan position. The categories of positions affected by the disbarment provisions also are enlarged. Section 802 also extends the disbarment period to 10 years, unless, on the convicted individual's motion, the sentencing court sets a lesser period of at least 5 years.

Section 802 also amends section 411(b) of ERISA by increasing the penalties for intentional violations of this section from 1 year to 5 years.

Section 802 amends section 411(c) of ERISA to change the definition of the word "convicted." Current law defines this as the date of the trial court judgment or the final appeal thereof, whichever is later. This title changes the date of disqualification to the date of the trial court judgment, regardless of appeals.

Section 802 also adds a new section 411(d) to ERISA which provides that any salary for a position in an employee benefit plan otherwise payable to a person convicted by a trial court shall be placed in escrow pending final disposition of any appeal.

Section 803 amends section 504(a) of Landrum-Griffin by adding to the list of crimes in the same manner that section 802 extended them under ERISA. The same disbarment provisions as contained in Section 802 are added as well.

Section 803 amends section 504(b) of Landrum-Griffin to increase the penalty for willful violations of that section from imprisonment for not more than 1 year to not more than 5 years.

Section 803 amends section 504(c) of Landrum-Griffin by changing the definition of the term "convicted" in the same manner as in section 411(c) of ERISA as discussed in Section 802 above.

Section 803 adds new section 504(d) to Landrum-Griffin to provide the same escrow provisions added to ERISA discussed with respect to section 802.

Section 804 amends section 411(c) of ERISA and section 504(c) of Landrum-Griffin to make retroactive the commencement of the period of disability at the time of the trial court judgment, as prescribed in sections 802 and 803 of this title.

TITLE IX—CURRENCY AND FOREIGN TRANSACTIONS REPORTING AMENDMENTS

INTRODUCTION

Title IX of this bill amends certain provisions in subchapter 53 of title 31 (relating the currency and foreign transactions reporting) and the Racketeer Influenced and Corrupt Organization (RICO) chapter of title 18, United States Code, in order to improve United States efforts to stem the illicit flow of currency involved in narcotics trafficking and money laundering schemes often associated with organized crime.[1] Senator Roth, at the time he introduced a bill earlier this Congress (S. 902) containing comparable provisions, noted:[2]

> Organized crime in the United States conceals as much as $40 billion a year in offshore countries whose banking and commercial secrecy laws prevent scrutiny. Ill-gotten gains, particularly from drug traffickers, are laundered routinely through these offshore havens. Conversion of drug profits into useable funds is now a highly sophisticated and professional operation. As a matter of fact, it is these offshore bank secrecy laws that are the glue holding criminal operations together. A whole new service industry has sprung up to support these illegal, unreported money flows. Satellite communications, advanced computers, CPA's, high-priced lawyers, light aircraft, fast boats, weapons, payoffs to officials, and intimidation all play an integral role in the growing success of funds laundering. Frequently, the base of operations for these illicit cash flows is nested in a tropical paradise with a solicitous and obliging government.
>
> * * * * *
>
> One of the most effective tools available to assist in monitoring and curtailing the vast flow of the illegal drug profits out of the country is * * * the Currency and Foreign Transactions Reporting Act, * * * intended to provide law enforcement agencies with recordkeeping and reporting

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[1] This title is similar to title IX, part I, of S. 2572, as passed by the Senate last Congress on September 30, 1982, by a vote of 95 to 1. For the most part, these provisions were developed from consideration of S. 1907 introduced by Senator Roth, Chairman of the Permanent Subcommittee on Investigations, in the 97th Congress and the evidence accumulated by the Permanent Investigations Subcommittee on the subject. For the results of this inquiry, see *Crime and Secrecy: The Use of Off-shore Banks and Companies,* Staff Study of the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 98th Cong., 1st Sess. (1983); *Crime and Secrecy: The Use of Off-shore Banks and Companies,* Hearings before the Permanent Subcommittee on Investigations of the Governmental Affairs Committee, United States Senate, 98th Cong., 1st Sess. (1983).

[2] 129 Cong. Rec. S 3854 (March 23, 1983 (daily ed.)).

> tools to investigate the financial resources connected with illegal activities, including drug trafficking.
>
> Yet various loopholes which have been found * * *
>
> Unless these loopholes are closed, the hands of the law enforcement authorities are virtually tied, as the major drug traffickers move billions of dollars out of the country without fear of detection or penalty.

Thus, the purpose of this title is to refine and improve an important successful Federal program to inhibit the illicit drug trade and organized crime.[3] It does so by focusing on the scope of the conduct prohibited, the level of civil and criminal penalties, search and seizure authority, rewards for informants, and scope of the racketeering offenses.[4]

CURRENCY AND FOREIGN TRANSACTIONS REPORTING AMENDMENTS

1. Present Federal law

The Currency and Foreign Transactions Reporting Act was codified last Congress as subchapter II of chapter 53 of title 31.[5] Insofar as relevant to this title, 31 U.S.C. 5316 requires a person to file a report at the time and place prescribed by the Secretary of the Treasury when the person knowingly transports or has transported monetary instruments of more than $5,000 at one time (1) from a place in the United States to or through a place outside the United States; or (2) to a place in the United States from or through a place outside the United States. It also requires a report when the person knowingly receives monetary instruments of more than $5,000 at one time transported into the United States from or through a place outside the United States. With respect to a person leaving the United States, the courts have held that, in the absence of an attempt provision, the law is not violated until the person is on the verge of boarding the plane or other mode of transportation at the final call for departure.[6] Under this construction, customs agents must, regardless of the exigencies and inconvenience of the developing situation, standby helplessly until virtually the last moment of departure before apprehending the suspect.

31 U.S.C. 5317 provides authority for the Secretary of the Treasury to apply to a court for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report either has not been filed, or if filed, contains a material omission or misstatement. It does not specifically address warrantless searches.

31 U.S.C. 5321 provides for the imposition of a civil penalty of up to $1,000 against a domestic financial institution, or an agent thereof, for willfully violating the requirement of the subchapter,

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[3] Another important enforcement aspect of the program under the Currency and Foreign Transactions Reporting Act is to prevent the using of off-shore laundering schemes to shield money from taxes. See generally, Investigations Subcommittee staff study and hearings, *supra* note 1.

[4] It should also be noted that part B of title XII of this bill adds Currency and Foreign Transactions Reporting Act violations to the list of offenses for which a court ordered electronic surveillance may be conducted.

[5] See Public Law 97-258, approved September 13, 1982. Subchapter II is titled "Records and Reports on Monetary Instruments Transactions".

[6] See *United States* v. *Rojas*, 671 F.2d 159 (5th Cir. 1982).

with a separate violation for each day the violation continues and at each office, branch, or place of business at which the violation occurs or continues. An additional civil penalty may be imposed on a person not filing a report, or filing a false report, not to exceed the amount of the monetary instrument for which the report was required.

Finally, 31 U.S.C. 5322 makes it an offense punishable by not more than one year in prison and a fine of $1,000, or both, to willfully violate a provision of the subchapter or a regulation prescribed thereunder. Willfully violating such a provision or regulation while, at the same time, violating another law of the United States, or as a part of a pattern of illegal activities involving transactions of more than $100,000 in a 12-month period, may be imprisoned for not more than five years and fined not more than $500,000, or both.

Current law does not include currency and foreign transaction reporting violations in the racketeering or electronic surveillance provisions of title 18.

2. Provisions of the bill as reported

The provisions of title IX of S. 1762, as noted, focus on a number of significant points to fine tune the current currency reporting law.

Section 901 of the bill amends title 31 to increase both the civil and criminal penalties applicable to a violation of the records and reporting requirements in subchapter II of chapter 53. While the full scope of these provisions is broad, it is important to recognize that they are primarily directed at persons who make a lucrative career in the illicit drug trade and organized crime. As such, the penalties are far too low to deter and punish such activity. Indeed, the modest penalties now applicable may simply be written off as a cost of doing business. Accordingly, section 901(a) of the bill raises the basic civil penalty for a willful violation from $1,000 to $10,000 and section 901(b) increases the criminal penalty for such a violation from a one year misdemeanor with a fine of up to $1,000 to a five year felony with a fine of up to $250,000.

Significantly, section 901(c) of the bill would broaden the scope of the reporting requirement in 31 U.S.C. 5316 to apply a person who knowingly "attempts to transport or have transported" a monetary instrument under circumstances otherwise requiring a report. This amendment closes a major loophole in the current law to permit apprehension of offenders before they depart the United States.

Section 901(c) also amends 31 U.S.C. 5316 to raise the reporting requirement threshold from $5,000 to $10,000. This amendment is designed to focus enforcement efforts on relatively large transactions, to eliminate the paper work and red tape with respect to relatively minor transactions, and to ameliorate the impact of inflation on the legitimate international traveler who commonly will travel abroad with amounts of more than $5,000 but less than $10,000.

Section 901(d) of this bill amends the search and seizure part of 31 U.S.C. 5317 to expressly provide authority for a customs officer to "stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or person entering or departing from the United States with respect to which the officer has reasonable cause to believe there is a monetary instrument being transported" in violation of the currency and foreign transactions requirements of title 31. This on the spot authority of the Customs Service would significantly enhance the effectiveness in monitoring and apprehending persons reasonably believed to be violating the currency reporting provisions of the law. The Committee is fully convinced that such authority is not only needed, but constitutional, under the line of cases holding that warrantless "border searches" are reasonable even without probable cause under the Fourth Amendment.[7]

Section 901(e) of this bill adds a new 31 U.S.C. 5323 to permit the Secretary of Treasury to reward an individual who provides original information which leads to a recovery of a civil penalty, fine or forfeiture of more than $50,000. The reward may not exceed 25 per centum of the net amount of the civil penalty, fine, or forfeiture, or $150,000, whichever is less. The Committee concurs with Senator Roth's observation that:[8]

> This provision is a critical tool in combatting drug trafficking. It is important to remember that we are dealing with a multibillion-dollar industry. Law enforcement authorities need some tool to combat the great financial attraction that remains in the drug trafficking industry.
>
> The majority of the vital investigations into major drug rings stem from informant tips—these tips are crucial to further investigations.
>
> Additionally the amount paid to the informant will be minimal in comparison to the amount gained in fines, civil penalties and forfeitures. Without the tip there may not have been any investigation and recovery—at all.

Section 901(f) amends the table of contents of chapter 53 of title 31 to add the new section title on rewards.

Section 901(g) amends the 18 U.S.C. 1961(1) definition of "racketeering activity" to include "any act which is indictable under the Currency and Foreign Transaction Reporting Act", thereby making this offense a predicate offense for a RICO prosecution. This amendment is made in recognition that major currency transaction violations are inherently a part of all major drug racketeering schemes and organized crime money laundering activities.

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[7] See, *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977), regarding entry searches; *United States* v. *Ajlouny*, 629, F.2d 830 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), and *United States* v. *Stanley*, 545 F.2d 661 (9th Cir. 1976), *cert. denied*, 436 U.S. 917 (1978), regarding exit searches. See also *California Bankers Association* v. *Shultz*, 416 U.S. 21, 63 (1974), which indicates in *dictum* that searches at the border of outbound traffic are legally indistinguishable from searches of inbound traffic for Fourth Amendment purposes.

[8] 129 Cong. Rec. § 3855 (March 23, 1983 (daily ed.)).

TITLE X—MISCELLANEOUS VIOLENT CRIME AMENDMENTS

Title X consists of a group of miscellaneous violent crime amendments divided into sixteen parts. In summary, they relate to murder for hire and violent crimes in aid of racketeering (Part A); Solicitation to commit a Federal crime of violence (Part B); the felony-murder rule (Part C); mandatory penalties for use of a firearm during a Federal crime of violence (Part D); use of armor-piercing bullets to commit a crime of violence (Part E); kidnapping Federal officials (Part F); crimes against family members of Federal officials (Part G); additions to the Major Crimes Act applicable in Indian country (Part H); destruction of motor vehicles (Part I); destruction of energy facilities (Part J); assaults upon Federal officials (Part K); escape from custody resulting from civil commitment (Part L); international extradition (Part M); Federal explosives offenses (Part N); and robbery of a pharmacy or other registered possessor of controlled substances (Part O).

PART A—MURDER-FOR-HIRE AND VIOLENT CRIME IN AID OF RACKETEERING ACTIVITY

1. In general

This Part of title X proscribes murder and other violent crimes committed for money or other valuable consideration or as an integral aspect of membership in an enterprise engaged in racketeering. It is similar to a provision contained in S. 2572 as passed by the Senate in the 97th Congress. Part A consists of two sections; the first defines the term "crime of violence", used here and elsewhere in the bill, while the second creates new offenses and additional definitions.

The offenses set forth in this Part are related but distinct. The first is limited to murder and punishes the travel in interstate or foreign commerce or the use of the facilities of interstate or foreign commerce or of the mails, as consideration for the receipt of anything of pecuniary value, with the intent that a murder be committed. The second extends to murder, kidnapping, or serious assault committed for anything of pecuniary value or for the purpose of gaining entrance into or maintaining or increasing one's position in an organized crime group.

With respect to the first offense, the Committee is aware of the concerns of local prosecutors with respect to the creation of concurrent Federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of State and local authorities.[1] However, the Committee believes that the option of Federal investigation and prosecution should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper Federal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails, is present. This does not mean, nor does the Committee intend, that all or even most such offenses should become matters of Federal responsibility. Rather, Federal jurisdiction should be asserted selectively based on such factors as the type of defendants reasonably believed to be involved and the relative ability of the Federal and State authorities to investigate and prosecute. For example, the apparent involvement of organized crime figures or the lack of effective local investigation because of the interstate features of the crime could indicate that Federal action was appropriate. On the other hand, the Committee fully appreciates that many State and local police forces and prosecutors offices are quite capable of handling a murder for hire case notwithstanding the presence of some interstate aspects and regardless of the criminal backgrounds of the defendants. Cooperation and coordination between Federal and State officials should be utilized to ensure that the new murder-for-hire statute is used in appropriate cases to assist the States rather than to allow the usurpation of significant cases by Federal authorities that could be handled as well or better at the local level.

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[1] See Crime Control Act Hearings (statement of the National District Attorney's Association, p. 27).

With respect to the second offense set out in Part A, the Committee concluded that the need for Federal jurisdiction is clear, in view of the Federal Government's strong interest, as recognized in existing statutes, in suppressing the activities of organized criminal enterprises, and the fact that the FBI's experience and network of informants and intelligence with respect to such enterprises will often facilitate a successful Federal investigation where local authorities might be stymied. Here again, however, the Committee does not intend that all such offenses should be prosecuted federally. Murder, kidnaping, and assault also violate State law and the States will still have an important role to play in many such cases that are committed as an integral part of an organized crime operation.

2. Present Federal law

Under current Federal law, the Interstate Travel in Aid of Racketeering (ITAR) statute, 18 U.S.C. 1952, covers murder and certain other crimes of violence if the perpetrator traveled in interstate or foreign commerce or used a facility of interstate or foreign commerce to commit it, and the crime was in furtherance of an unlawful activity involving offenses related to gambling, untaxed liquor, narcotics, prostitution, extortion, bribery, or arson. There is no general Federal proscription against murder even if interstate travel or the use of interstate facilities is involved in its commission. The general Federal murder statute, 18 U.S.C. 1111, applies mainly territorially, in the special maritime and territorial jurisdiction of the United States[2] and in the Indian Country[3] or if the victim is a person as to whom there is a particular Federal interest in vindicating the offense.[4]

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[2] 18 U.S.C. 7.

[3] 18 U.S.C. 1151.

3. Provisions of the bill, as reported

Part A adds two new sections, 1952A and 1952B, to title 18, United States Code. Section 1952A follows the format of present section 1952. Section 1952A reaches travel in interstate or foreign commerce or the use of the mails or of a facility in interstate or foreign commerce with the intent that a murder be committed in violation of State or Federal law. The murder must be carried out or planned as consideration for the receipt of "anything of pecuniary value." This term is defined to mean money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage. Thus, an option to purchase would clearly qualify as would a promise of future payment even if the contract were unenforceable as contrary to public policy. The term "facility of interstate commerce" is also defined to include means of transportation and communication. Thus, an interstate telephone call is sufficient to trigger Federal jurisdiction, as it is under the ITAR statute.[5] Both the person who ordered the murder and the "hit man" would be covered by the new section provided the interstate commerce or mail nexus is present. For example, if A pays money to B to go from State X to State Y to murder C, both A and B have violated the statute. In this situation, B's travel was caused by A.

The gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent and the offense is complete whether or not the murder is carried out or even attempted. In such a case, the punishment extends to five years of imprisonment and a $5,000 fine. If, however, personal injury results, the punishment is up to twenty years of imprisonment and a $20,000 fine; and if death results, the punishment can extend to life imprisonment and a $50,000 fine.

Section 1952B proscribes contract murders and other violent crimes by organized crime figures. Such crimes frequently do not involve interstate travel or the use of interstate facilities and are sometimes not performed for money or other direct pecuniary benefit, but rather as an aspect of membership in a criminal organization. Therefore, the new section proscribes not only murder, kidnapping, maiming, serious assaults, and the other enumerated offenses when done as consideration for the receipt of or a promise or agreement to pay "anything of pecuniary value"[6] from an enterprise engaged in racketeering activity, but also such crimes when done for the purpose of gaining entrance to or maintaining or increasing position in such an enterprise. The term "enterprise" is defined as "any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." The definition is very similar to that in 18 U.S.C. 1961, the Racketeer Influenced and Corrupt Organizations (RICO) statute, which has been held to include illegal organizations such as organized crime "families" as well as legitimate business organizations.[7] The Committee intends that the term enterprise here have the same scope. Racketeering activity is defined to incorporate the definition set forth in present section 1961. Attempted murder, kidnaping, maiming and assault are also covered. While section 1952B only covers the person who actually commits or attempts the offense as opposed to the person who requested or ordered it, the latter person would be punishable as an aider and abettor under 18 U.S.C. 2.

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[4] 18 U.S.C. 1116 (internationally protected persons). See also 18 U.S.C. 351 (members of Congress and of the Cabinet); 18 U.S.C. 1751 (the President and Vice President).

[5] See *United States* v. *Villano*, 529 F.2d 1046 (10th Cir.), cert. denied, 426 U.S. 953 (1976). The Committee intends that the full breadth of the phrase "any facility in interstate or foreign commerce" as used in the ITAR statute also be applicable here. See *Erlenbaugh* v. *United States*, 409 U.S. 239 (1972) (interstate newspaper).

[6] The Committee intends that "anything of pecuniary value" have the same meaning as in section 1952A.

Section 1952B also covers threats to commit a "crime of violence." The term "crime of violence" is defined, for purposes of all of title 18, United States Code, in section 1001 of the bill (the first section of Part A of title X). Although the term is occasionally used in present law,[8] it is not defined, and no body of case law has arisen with respect to it. However, the phrase is commonly used throughout the bill,[9] and accordingly the Committee has chosen to define it for general application in title 18.

The definition is taken from S. 1630 as reported in the 97th Congress.[10] The term means an offense—either a felony or a misdemeanor—that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any felony that, by its nature, involves the substantial risk that physical force against another person or property may be used in the course of its commission. The former category would include a threatened or attempted simple assault[11] or battery[12] on another person; offenses such as burglary in violation of a State law and the Assimilative Crimes Act[13] would be included in the latter category inasmuch as such an offense would involve the substantial risk of physical force against another person or against the property.

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[7] *United States* v. *Turkette*, 452 U.S. 576 (1981).

[8] It is used in the ITAR statute, but no reported prosecutions appear to have been brought under this branch of 18 U.S.C. 1952.

[9] For example, "crime of violence" is used in title I (bail), in several other parts of title X, and in title XII, Part A (prosecution of certain juveniles as adults).

[10] See S. 1630, as reported, section 111; S. Rept. No. 97-307.

[11] 18 U.S.C. 113(e).

[12] 18 U.S.C. 113(d).

[13] 18 U.S.C. 13.

PART B—SOLICITATION TO COMMIT A CRIME OF VIOLENCE

1. In general and present Federal law

Part B of title X is designed to proscribe the offense of solicitation to commit a Federal crime of violence. It is derived from a provision in S. 2572 as passed by the Senate in the 97th Congress. The Committee believes that a person who makes a serious effort to induce another person to commit a crime of violence is a clearly dangerous person and that his act deserves criminal sanctions whether or not the crime of violence is actually committed. The principal purpose of the new section is to allow law enforcement officials to intervene at an early stage where there has been a clear demonstration of an individual's criminal intent and danger to society. Of course, if the person solicited actually carries out the crime, the solicitor is punishable as an aider and abettor.[1]

At the present time there is no Federal law that prohibits solicitation generally, although there are a few statutes defining specific offenses which contain language prohibiting solicitation. For example, the current bribery statute[2] prohibits soliciting the payment of a bribe. Moreover S. 1630, as approved by the Committee in the 97th Congress, included a solicitation offense that would have applied to a wide panoply of offenses,[3] not just to solicitations to commit a crime of violence covered by Part B.

2. Provisions of the bill, as reported

Part B of title X adds a new section 373 to title 18 to proscribe the soliciting, commanding, inducing, or otherwise endeavoring to persuade another person to engage in conduct constituting a crime of violence, with the intent that the crime actually be committed. The solicitation, command, or inducement must be under circumstances that strongly corroborate the person's intent that the other person actually engage in conduct constituting the crime of violence. The penalty is up to one-half the maximum prison term and fine that could be imposed for the crime solicited, and up to twenty years if that crime carries the sentence of death.

A lengthy discussion of the elements of the offense, which the Committee intends to apply to Part B, is contained in the Report on S. 1630 in the 97th Congress.[4] In general the solicitation or command must be made under circumstances showing that the actor is serious that the "crime of violence"[5] be carried out. Thus, a person at a baseball game who shouts "kill the umpire" would not be guilty of the offense since the circumstances would not bear out the conclusion that he genuinely wanted the result. On the other hand, a person who shouted encouragement to a mob surrounding a jail to lynch a prisoner might well be found to have intended that other persons engage in violent criminal conduct. Additionally, the defendant must engage in conduct characterizable as commanding, entreating, inducing, or endeavoring to persuade another person to act. For example, an order to commit an offense made by a person to another with whom he stands in a relationship of influence or authority would constitute a command. Threatening another person if he will not commit a offense would constitute a form of inducement or endeavoring to persuade as would offering to pay him to commit an offense.

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[1] 18 U.S.C. 2.

[2] 18 U.S.C. 201.

[3] See section 1003 of S. 1630 and the discussion at pages 179-186 of S. Rept. No. 97-307 (97th Cong., 1st Sess.).

[4] See, *id* at 182-184.

[5] The term "crime of violence" is defined in Part A of this title and the discussion in this Report thereon should be consulted.

While the section rests primarily on words of instigation to crime, the Committee wishes to make it clear that what is involved is legitimately proscribable criminal activity, not advocacy of ideas that is protected by the First Amendment right of free speech.[6] The Committee agrees with the following summary by a respected First Amendment scholar of the relationship between the First Amendment and criminal solicitation:[7]

> The problem is, indeed, no different from that involving the use of speech generally in the commission of crimes of action. Most crimes—certainly those in which more than one person participates—involve the use of speech or other communication. Where the communication is an integral part of a course of criminal action, it is treated as action and receives no protection under the First Amendment. Solicitation to crime is similar conduct, but in a situation where for some reason the contemplated crime does not take place. Solicitation involves a hiring or partnership arrangement, designed to accomplish a specific action in violation of law, where the communication is an essential link in a direct chain leading to criminal action, though the action may have been interrupted. In short, the person charged with solicitation must, in a direct sense, have been a participant in an abortive crime of action. Thus the crime of criminal solicitation may be seen as a particular instance of the more general category of criminal attempts. Here, also, the applicable legal doctrine undertakes to draw the line between "expression" and "action." The fact that issues of this nature rarely arise indicates that establishing the division between free expression and solicitation to crime has not created a serious problem.

Subsection (b) provides an affirmative defense of renunciation under the section. For the defense to apply, the defendant must have voluntarily and completely abandoned his criminal intent and actually prevented the commission of the crime (not merely made efforts to prevent it). The subsection specifically provides that a renunciation is not complete and voluntary if it is motivated in whole or in part by a decision to postpone the commission of the crime to another time or to substitute another victim. If the defendant raises the defense of renunciation, he has the burden of proving it by a preponderance of the evidence.

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[6] The Committee adopts the discussion of the tangential relationship of the First Amendment to the solicitation offense in S. Rept. No. 97-307, 97th Cong., 1st Sess., pp. 180-182.

[7] Emerson, "*Toward a General Theory of the First Amendment,*" p. 83 (1966).

Subsection (c) provides that the solicitor cannot successfully assert a defense that the solicitee could not be convicted of the crime of violence because he lacked the state of mind required or was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution. The prohibition of this defense is based on the universally acknowledged principle that one is no less guilty of the commission of a crime because he uses the overt behavior of an innocent or irresponsible agent.[8] On the other hand, this provision does not mean that the irresponsibility or incompetence of the solicitee is never relevant. The lack of responsibility or competence of the person solicited may be highly relevant in determining the solicitor's intent. For example, an entreaty to a young child or to an imbecile may indicate the solicitor's lack of serious purpose.

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[8] See e.g., *Nigro* v. *United States*, 117 F.2d 624 (8th Cir. 1941); *United States* v. *Brandenburg*, 155 F.2d 110 (8th Cir. 1946) (physician circulating illegal narcotics prescriptions guilty of sale by innocent druggist).

PART C—FELONY-MURDER RULE

1. In general and present Federal law

Part C of title X expands the definition of felony murder. It is identical to a provision in S. 2572 as passed by the Senate in the 97th Congress. Under the common law, a murder committed during any felony was held to be committed with a sufficient degree of malice to warrant punishment as first degree murder. However, under present Federal law, 18 U.S.C. 1111, the felony murder doctrine only applies to killings committed during an actual or attempted arson, rape, burglary, or robbery. The Committee has concluded that limiting the felony-murder rule to these four offenses is too restrictive. For example, the current statute does not cover a killing committed during the crimes of treason, espionage, or sabotage, or during a kidnaping or prison escape, crimes which pose as great if not a greater threat to human life than the four already listed.

2. Provisions of the bill, as reported

Part C of title X amends 18 U.S.C. 1111(a), which presently provides that every willful, deliberate, malicious, and premeditated killing, or every killing "committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery" is murder in the first degree. The amendment adds the offenses of escape, murder, kidnaping, treason, espionage, and sabotage to the four listed offenses. Thus the felony murder rule would apply to a killing occurring during one of these offenses and would constitute first degree murder. Murder is included in the list to cover a situation in which the defendant acts in the heat of passion in an attempt to kill A, but instead kills B. The Committee believes that the danger to innocent persons presented in this type of situation is so severe that the defendant should be charged with first degree murder even though if he had killed A he could only be charged with second degree murder.

Part D—Mandatory Penalty for the use of a Firearm in a Federal Crime of Violence

1. In general and present Federal law

Part D of title X is designed to impose a mandatory penalty without the possibility of probation or parole, for any person who uses or carries a firearm during and in relation to a Federal crime of violence. Although present Federal law, section 924(c) of title 18, appears to set out a mandatory minimum sentencing scheme for the use or unlawful carrying of a firearm during any Federal felony, drafting problems and interpretations of the section in recent Supreme Court decisions have greatly reduced its effectiveness as a deterrent to violent crime.

Section 924(c) sets out an offense distinct from the underlying felony and is not simply a penalty provision.[1] Hence, the sentence provided in section 924(c) is in addition to that for the underlying felony and is from one to ten years for a first conviction and from two to twenty-five years for a subsequent conviction. However, section 924(c) is drafted in such a way that a person may still be given a suspended sentence or be placed on probation for his first violation of the section, and it is ambiguous as to whether the sentence for a first violation may be made to run concurrently with that for the underlying offense. Some courts have held that a concurrent sentence may be given.[2] Moreover, even if a person is sentenced to imprisonment under section 924(c), the normal parole eligibility rules apply.

In addition to these problems with present section 924(c), the Supreme Court's decisions in *Simpson* v. *United States,*[3] and *Busic* v. *United States,*[4] have negated the section's use in cases involving statutes, such as the bank robbery statute[5] and assault on Federal officer statute[6] which have their own enhanced, but not mandatory, punishment provisions in situations where the offense is committed with a dangerous weapon. These are precisely the type of extremely dangerous offenses for which a mandatory punishment for the use of a firearm is the most appropriate.

In *Simpson,* the defendants had been convicted of armed bank robbery involving the use of a dangerous weapon or device in violation of 18 U.S.C. 2113 (a) and (d), and of using firearms to commit the robbery in violation of 18 U.S.C. 924(c). They were sentenced to maximum terms of 25 years in prison on the aggravated robbery count and to 10-year consecutive prison terms on the firearms count. The Supreme Court held that the statutory construction and legislative history of section 924(c) rendered it inapplicable in cases where the predicate felony statute contains its own enhancement provision for the use of a dangerous weapon.

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[1] *Simpson* v. *United States,* 435 U.S. 6, 10 (1978).

[2] *United States* v. *Sudduth,* 457 F.2d 1198 (9th Cir. 1972); *United States* v. *Gaines,* 594 F.2d 541 (7th Cir. 1979).

[3] *Supra,* note 1.

[4] 446 U.S. 398 (1980).

[5] 18 U.S.C. 2113.

[6] 18 U.S.C. 111.

In *Busic*, the two defendants had been convicted, among other things, of narcotics offenses, and of armed assault on Federal officers resulting from a shoot-out with agents of the Drug Enforcement Administration, in violation of 18 U.S.C. 111. In addition, one defendant had been convicted of using a firearm in the commission of a felony, in violation of 18 U.S.C. 924(c)(1) and the other of carrying a firearm in the commission of a felony, under section 924(c)(1). Each was sentenced to a total of 30 years of imprisonment, of which five years resulted from concurrent sentences on the narcotics charges, five were the result of the assault charges, and 20 were imposed for the section 924(c) violations. Relying on *Simpson*, the Supreme Court held that where the predicate felony statute contains its own enhancement provision, section 924(c) "may not be applied at all * * *"[7] Thus, the twenty-year sentence was nullified.

The Committee has concluded that subsection 924(c) should be completely revised to ensure that all persons who commit Federal crimes of violence, including those crimes set forth in statutes which already provide for enhanced sentences for their commission with a dangerous weapon,[8] receive a mandatory sentence, without the possibility of the sentence being made to run concurrently with that for the underlying offense or for any other crime and without the possibility of a probationary sentence or parole.

2. Provisions of the bill, as reported

Part D of title X represents a complete revision of subsection 924(c) of title 18 to overcome the problems with the present subsection discussed above. As amended by Part D, section 924(c) provides for a mandatory, determinate sentence for a person who uses or carries a firearm during and in relation to any Federal "crime of violence," including offenses such as bank robbery or assault on a Federal officer which provide for their own enhanced punishment if committed by means of a dangerous weapon.[9] In the case of a first conviction under the subsection, the defendant would be sentenced to imprisonment for five years. For a second or subsequent conviction he would receive a sentence of imprisonment for ten years. In either case, the defendant could not be given a suspended or probationary sentence, nor could any sentence under the revised subsection be made to run concurrently with that for the predicate crime or with that for any other offense. In addition, the Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense. For example, a person convicted of armed bank robbery in violation of section 2113 (a) and (d) and of using a gun in its commission (for example by pointing it at a teller or otherwise displaying it whether or not it is fired)[10] would have to serve five years (assuming it was his first conviction under the subsection) less only good time credit for proper behavior in prison, before his sentence for the conviction under section 2113 (a) and (d) could start to run. Finally, a person sentenced under the new subsection 924(c) would not be eligible for parole.

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[7] *Supra*, note 4 at 407.

[8] These statutes include 18 U.S.C. 111, 112, 113, 2113, 2114 and 2231. Enhancement of sentences varies widely among these sections and the terms called for are generally less than the penalty under section 924(c).

[9] The term "crime of violence" is defined in Part A of this title and the discussion in the Report thereon should be consulted here. In essence the term includes any offenses in which the use of physical force is an element and any felony which carries a substantial risk of such force. Thus, the section expands the scope of predicate offenses, as compared with current law, by including some violent misdemeanors, but restricts it by excluding non-violent felonies.

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[10] Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape. The requirement in present section 924(c) that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of a State or local law, has been eliminated as unnecessary. The "unlawfully" provision was added originally to section 924(c) because of Congressional concern that without it policemen and persons licensed to carry firearms who committed Federal felonies would be subjected to additional penalties, even where the weapon played no part in the crime, whereas the section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act. See *United States* v. *Howard*, 504 F.2d 1281, 1285–1286 (8th Cir. 1974). The Committee has concluded that persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as a person whose possession of the gun violates a State or local ordinance. Moreover, the requirement that the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

PART E—ARMOR-PIERCING BULLETS

1. In general and present Federal law

Part E of title X provides for a new offense of using armor-piercing handgun ammunition during and in relation to a Federal crime of violence. This section is new to Federal law but an identical provision was included in S. 2572 as passed by the Senate in the last Congress. This provision was developed in response to the publicity that has been given in recent years to the easy availability of ammunition that will penetrate the type of bullet-resistant vests commonly used by police officers and high public officials. The Committee is concerned that this publicity will have a two-fold adverse effect. First, it may encourage assassins and other criminals to search out this particularly dangerous type of ammunition for use in their endeavors. Second, the publicity may encourage a fatalistic attitude by police officers who may decide that the use of body armor is not worth the discomfort of wearing it. In this regard, it should be noted that the soft body armor worn by policemen today, while relatively light and comfortable in comparison with older types, is by no means "bullet-proof." It is designed to defeat the most common types of handgun ammunition but will not stop rounds designed to pierce armor.

The Committee is aware of the many bills that have been introduced in the House and Senate that have attempted to prohibit the role or use of handgun bullets either designed to pierce or which are otherwise capable of piercing common police body armor.[1] These bills commonly define body armor in terms of penetration resistance equal to a certain number of layers of Kevlar, a trade name for a synthetic fiber used in most modern body armor. The bills also frequently give the Secretary of the Treasury or some other official the authority to determine the procedures to measure the degree to which bullets will pierce body armor.

The Committee is concerned that any such test or procedures would result in criminalizing the use of a large number of bullets currently on the market and which are not intended to defeat body armor. Like the Department of Justice, the Committee has "serious concerns over whether * * * any * * * test that might be devised at the present time would reach all handgun ammunition rounds capable of penetrating soft body armor without including a number of popular handgun bullets which have long been widely used for legitimate sporting and recreational purposes. The simple fact is that some bullets with a legitimate use will defeat soft body armor."[2]

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[1] See e.g., S. 555 and S. 604 (98th Cong. 1st Sess.)

[2] Letter from Assistant Attorney General Robert A. McConnell to the Committee concerning S. 555 and S. 604, May 20, 1983.

Accordingly, the Committee believes that the most effective way to deal with the problem of armor-piercing bullets is to discourage the carrying during a Federal crime of violence of a handgun loaded with any bullet which, if fired from that handgun, would pierce the most commonly worn type of police body armor. Since the ammunition must be used with a handgun in a crime of violence the new provision will in no way criminalize the legitimate sporting, recreational, or self-defense use of any type of handgun or ammunition.

2. Provisions of the bills, as reported

Part E of title X adds a new section 929 to title 18 to provide for a mandatory term of at least five years of imprisonment for using or carrying any handgun loaded with armor-piercing ammunition during and in relation to a crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device.[3] "Armor-piercing ammunition" is defined as ammunition which, if fired from the handgun used or carried in the crime of violence, "under the test procedure of the National Institute of Law Enforcement and Criminal Justice Standard for the Ballistics Resistance of Police Body Armor promulgated December, 1978,"[4] is determined to be capable of penetrating bullet-resistant apparel or body armor meeting the requirements of Type II A of Standard NILECJ-STD 0101.01 as formulated by the United States Department of Justice and published in December of 1978. This is the most commonly worn type of police body armor.

Handgun is defined as "any firearm, including a pistol or revolver, originally designed to be fired by the use of a single hand." Thus, the definition would not include a sawed-off rifle, but would include a pistol or revolver that had been customized by the addition of an extra long barrel.

The new section provides that a person sentenced under it shall not be given a suspended sentence or placed on probation. Moreover, he is not eligible for parole. The sentence cannot be served concurrently with any other sentence, including a sentence for the underlying crime of violence or for a conviction under section 924(c) [5] for using or carrying the gun itself in connection with the crime of violence. In short the Committee intends that the mandatory punishment for the use of the armor-piercing ammunition under section 929 be in addition to the mandatory punishment for the use or carrying of the firearm under the amended section 924(c). Thus, a person who robbed a bank with a handgun loaded with armor-piercing ammunition would, if charged with and convicted of a violation of 18 U.S.C. 924 and 929, be sentenced to a mandatory term of at least ten years—five for carrying the gun and at least five for the bullets—without parole eligibility before he began to serve any sentence imposed for a conviction of the underlying bank robbery. As in the case with section 924(c), section 929 sets out a separate offense, not just a punishment provision. Therefore, it is not necessary to charge the defendant with a violation of the underlying offense to charge him with a violation of section 929.

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[3] The term "crime of violence" is defined in Part A of this Title and the discussion thereon in this report should be consulted. The specific reference to a crime which provides for an enhanced punishment if committed with a deadly or dangerous weapon is to ensure that the new section applies to carrying a handgun loaded with armor-piercing ammunition in offenses such as a bank robbery (18 U.S.C. 2113) and assault on a Federal officer (18 U.S.C. 111) which have such provision. The Committee wishes to ensure that the holdings of the Supreme Court in *Simpson* v. *United States,* 435 U.S. 6 (1978) and *Busic* v. *United States,* 446 U.S. 398 (1980) with respect to present section 924(c) do not apply here. See generally the discussion of Part D which amends section 924(c) to eliminate these problems.

[4] The test procedure involves firing the bullet from the handgun used in the crime into Type II A body armor five meters away. The test is such that it could be conducted by any of a number of Federal law enforcement agencies and many police departments. The Committee intends that any competent law enforcement organization, State or Federal, conduct the test. Whether or not a bullet has penetrated is, of course, a fact question to be answered ultimately by the jury, but the ballistics expert who conducts the test can express his opinion on penetration. See Rule 704, Federal Rules of Evidence.

[5] See the discussion of Part D of title X, *supra.*

PART F—KIDNAPING OF FEDERAL OFFICIALS

1. In general and present Federal law

Part F of title X amends the Federal kidnaping statute to cover the kidnaping of Federal officers and employees while they are engaged in, or on account of, the performance of their official duties. The present Federal kidnaping statute, 18 U.S.C. 1201, covers kidnaping if the victim is transported in interstate or foreign commerce, if done within the special maritime or territorial jurisdiction of the United States, if done within the special aircraft jurisdiction of the United States, or if the person is a foreign official, an internationally protected person, or an official guest. Thus, the kidnaping of a Federal officer would not be covered except in the unlikely event that the victim officer was transported in interstate or foreign commerce or the event took place in the special maritime, territorial, or aircraft jurisdiction. At the present time the only personal crimes directed at most Federal officers and employees because of their status are murder [1] and assault [2]. (The kidnaping of Members of Congress, Cabinet Officers and their principal deputies, the Director and Deputy Director of the CIA, and Supreme Court Justices is covered by 18 U.S.C. 351, and the kidnaping of the President, the Vice President and approximately 20 of the top echelon Presidential and Vice Presidential staff members is covered by 18 U.S.C. 1751.)

The Committee has concluded that the kidnaping of any of the Federal officers and employees listed in 18 U.S.C. 1114 should be a Federal crime. These persons are generally engaged in law enforcement or similar work which can bring them into hostile encounters with the public solely because of their work as Federal employees. Moreover, their status could make them a target for a hostage-taking by a terrorist or subversive group.

2. Provisions of the bill, as reported

Part F of title X adds a new subsection (5) to 18 U.S.C. 1201(a), the Federal kidnaping statute, so that the kidnaping of any of the officers and employees designated in section 1114 of title 18 is covered, provided the act is committed while the Federal employee victim is engaged in, or on account of, the performance of his official duties. The "engaged in or on account of the performance of official duties" limitation is identical to that in 18 U.S.C. 111 and 18 U.S.C. 1114, which proscribe assaults on Federal officers and murder of Federal officers, respectively. The Committee intends that the body of case law that has developed concerning the meaning of the term in reference to these two statutes apply here. For example, in *United States* v. *Reid*[3] an off duty DEA agent was in a barbershop getting a haircut when he heard a commotion indicating a robbery in progress next door in a liquor store. He was shot and wounded when he intervened to try to apprehend the defendants. The assault on Federal officers statute was held to apply to the defendant because of a written DEA policy that off duty agents were expected to take reasonable action as law enforcement officers to prevent State felonies and violent misdemeanors and apprehend the violators.

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[1] 18 U.S.C. 1114.

[2] 18 U.S.C. 111. The assault statute references 18 U.S.C. 1114 for the list of the officers and employees covered.

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[3] 517 F.2d. 953 (2nd Cir. 1975).

PART G—CRIMES AGAINST FAMILY MEMBERS OF FEDERAL OFFICIALS

1. In general and present Federal law

Part G of title X is a new provision designed to protect the close relatives of certain high level officials, such as the President, Vice-President, Members of Congress, Cabinet Officers, and Federal judges, as well as Federal law enforcement officers, from assaults, kidnapings, or murders committed with intent to impede, intimidate, interfere with or retaliate against the Federal official, judge, or law enforcement officer while engaged in or on account of his official duties. It would add a section 115 to title 18 to make assaults, kidnapings, or murders of the immediate family members of these persons Federal crimes, if committed with the requisite intent. Threats or attempts to commit these offenses with the requisite intent would also be covered.

At the present time the only Federal statute that covers any of these offenses is 18 U.S.C. 879, a section added in the last Congress [1] which proscribes threats to kill, kidnap, or inflict bodily harm upon a member of the immediate family of the President or Vice President. The penalty for a violation of this section is only three years of imprisonment and a $1,000 fine, even if the threat is carried out. This section's chief utility is in allowing the Secret Service to investigate such threats and if necessary to intervene before the threat can be implemented.

The Committee believes that serious crimes against family members of high level Federal officials, Federal judges, and Federal law enforcement officers, which are committed because of their relatives' jobs are, generally speaking, proper matters of Federal concern. Clearly it is a proper Federal function to respond to terrorists and other criminals who would seek to influence the making of Federal policies and interfere with the administration of justice by attacking close relatives of those entrusted with these tasks. The Committee does not intend, however, that Federal jurisdiction over these crimes should be exclusive. In many instances, a crime against, for example, the child of a Cabinet Officer, even though committed because of the defendant's opposition to the policies of the child's parent, could be adequately handled by State investigators and prosecutors.

2. Provisions of the bill, as reported

Part G of title X adds a new section 115 to title 18. Subsection (a) provides that anyone who assaults, kidnaps, or murders, or attempts to kidnap or murder, or threatens to assault, kidnap or murder a member of the immediate family of a United States official, of a United States judge, of a Federal law enforcement officer, or of an official listed under 18 U.S.C. 1114, with intent to impede, intimidate, interfere with, or retaliate against the official, judge, or law enforcement officer while he is engaged in, or on account of the performance of his official duties, shall be punished as provided in subsection (b). Subsection (b), in turn, provides that an assault is to be punished as set forth in section 111 which provides for a $5,000 fine and three years of imprisonment for a simple assault, and ten years of imprisonment and a $10,000 fine for assault with a dangerous weapon;[2] a kidnaping or attempted kidnaping is to be punished as set forth in section 1201 which provides for up to life imprisonment for kidnaping and up to twenty years of imprisonment for an attempt;[3] a murder or attempted murder is to be punished as set forth in sections 1111 and 1113, which provide for up to life imprisonment and up to three years of imprisonment[4] respectively; and a threat to kidnap or murder is to be punished by up to five years of imprisonment and a $5,000 fine, while a threatened assault is to be punished by up to three years of imprisonment and a $3,000 fine.

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[1] Public Law 97-297.

The term "immediate family member" is defined in subsection (c) to mean the Federal official's spouse, parent, brother or sister, child or person to whom he stands in loco parentis, or any other person living in his household and related to him by blood or marriage.

The term "Federal law enforcement officer" is also defined in subsection (c) as meaning any officer, agent, or employee of the United States authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any Federal criminal law. It should be noted that the new section covers attacks on family members of all the persons listed in 18 U.S.C. 1114 as well as on family members of other law enforcement officers not there listed.[5] Included in this latter category would be, for example, the Inspectors General and their staffs, and Department of Justice Strike Force Attorneys.

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[2] An attempted assault is not covered inasmuch as an attempted assault on the official himself, committed with the same intent, is not proscribed by 18 U.S.C. 111.

[3] Only attempts to violate 18 U.S.C. 1201(a)(4), kidnaping of foreign officials, official guests and internationally protected persons are punished under 1201, but the Committee intends that the twenty year period set as punishment for a violation of this subsection apply to attempted kidnapings in violation of 18 U.S.C. 115.

[4] In many instances an attempted murder would also violate the assault with a dangerous weapon provision which would allow for up to ten years of imprisonment.

[5] This apparent anomaly which provides greater protection for family members of Federal employees than for the employees themselves is cured by Part K which would give the Attorney General the authority to add additional Federal employees to the list in 18 U.S.C. 1114 as the need arises.

PART H—ADDITION OF MAIMING AND INVOLUTARY SODOMY TO THE MAJOR CRIMES ACT

1. In general and present Federal law

Part H of title X adds two new offenses to those presently included in 18 U.S.C. 1153, the Major Crimes Act, which applies to offenses committed by Indians in the Indian Country.[1] The significance of section 1153 can best be understood by reference to section 1152. Under section 1152, the "general laws of the United States," i.e., those applicable in the special maritime and territorial jurisdiction of the United States, are made applicable to the Indian Country. However, the second paragraph of sectin 1152 provides an exception for offenses committed by one Indian against the person or property of another Indian. These offenses can generally only be prosecuted in tribal court where the maximum punishment is currently six months of imprisonment and a $500 fine.[2] Since tribal court punishment has long been felt to be inadequate for the most serious offenses committed by one Indian against another, the Major Crimes Act was enacted as an exception to the second paragraph of 18 U.S.C. 1152.[3] Section 1153 has been amended from time to time and now includes fourteen serious offenses. Not included, however, are maiming and involutary sodomy. An Indian who commits one of these offenses against another Indian is only subject to prosecution in tribal court.[4]

The Committee believes that both maiming and involuntary sodomy should be included in the Major Crimes Act. Maiming is one of the oldest of Federal crimes, having been first proscribed in 1790.[5] Although seldom prosecuted, the offense as currently defined is among the most heinous of crimes against the person. 18 U.S.C. 114 provides for seven years of imprisonment and a $1,000 fine for whoever in the special maritime and territorial jurisdiction "with intent to maim or disfigure, cuts, bites or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person", or "throws or pours upon another person, any scalding water, corrosive acid, or caustic substance."

There seems no reason why this offense, presently applicable within the special maritime and territorial jurisdiction of the United States, is not included within the Major Crimes Act, the purpose of which is to extend Federal jurisdiction over all serious offenses "against the person or property of another" that are committed by an Indian in Indian country. While an offense constituting maiming could usually be prosecuted under the Major Crimes Act as an "assault resulting in serious bodily injury" under 18 U.S.C. 113(f), the Committee believes it is appropriate to amend the Major Crimes Act to permit a prosecution for the more specific and serious offense of maiming, if such an opportunity arises, rather than using the general assault provisions in 18 U.S.C. 113.

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[1] The term "Indian Country" is defined in 18 U.S.C. 1151 to include, inter alia, Indian reservations.

[2] 25 U.S.C. 1302(7).

[3] See Act of March 3, 1885, § 9, 23 Stat 385.

[4] Unfortunately this discriminates against Indian victims. This is so because if an Indian committed one of these crimes against a non-Indian he would be subject to prosecution under 18 U.S.C. 1152 and 114 in the case of maiming or under 1152 and 13 (the Assimilative Crimes Act), and State law in the case of sodomy. Only when the victim is another Indian is there an inability to bring the perpetrator to justice.

[5] 1 Stat 115.

The crime of forcible or involuntary sodomy, although one of the most serious sexual offenses known to our law, is not now within the Major Crimes Act.[6] Its absence represents a serious gap in felony coverage making it impossible to prosecute and punish (except by a tribal court at a petty offense level) this offense when committed against an Indian victim by an Indian in Indian country. In at least one case of which the Committee is aware, prosecution of an Indian for forcibly sodomizing his three-year old grandson had to be declined for failure of the Major Crimes Act to proscribe sodomy. Clearly, in a case where the victim and the offender are of the same family, such a result may have continuing tragic consequences since there may be no other practicable way to remove the offender from the situation and to protect the victim from his unwanted sexual attention.

2. Provisions of the bill, as reported

Part H of title X amends 18 U.S.C. 1153 by inserting the words "maiming" and "involuntary sodomy" into the list of offenses there set out for the reasons explained above.[7] In addition, the Committee struck out the word "larceny" that appears in present section 1153 and replaced it with the term "a felony under section 661 of this title." 18 U.S.C. 661 has been held to define "larceny" for purposes of section 1153.[8] Section 661 makes larcenies of $100 or less a misdemeanor punishable by a fine of up to $1,000 and up to a year in prison and makes all other larcenies felonies punishable by up to five years of imprisonment and a $5,000 fine. Federal jurisdiction over an Indian for committing petty larceny [9] is anomalous in light of the fact that the purpose of the Major Crimes Act is to cover only certain enumerated major offenses and that all of the other offenses in section 1153 are serious felonies such as murder, rape, and arson. Moreover, jurisdiction over petty larceny is unnecessary and virtually never asserted in light of tribal court jurisdiction over this offense. The Committee therefore believes it is appropriate to limit Major Crimes Act jurisdiction over larcenies to those larcenies that are felonies.

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[6] Sodomy is not embraced within the concept of "rape", which embodies only the common law crime of forcible intercourse by a male with a female. See *United States* v. *Smith*, 574 F.2d 988, 990 (9th Cir.), cert. denied, 439 U.S. 852 (1978). Likewise, although "incest," as defined by State law, is included within the Major Crimes Act, sodomy is a distinct offense that is not typically covered by State incest laws.

[7] It is also provided that involuntary sodomy, like the present major crimes of burglary and incest, shall be defined and punished in accordance with the laws of the State in which the offense was committed. There is no Federal law defining these offenses but title 18 provides definitions (at least by reference to common law) and punishments for all the others.

[8] See, e.g., *United States* v. *Gristeau*, 611 F.2d 181 (7th Cir. 1979), cert. denied 447 U.S. 907 (1980).

[9] See *United States* v. *Gilbert*, 378 F. Supp. 82, 89-93 (D. S. Dak. 1974).

PART I—DESTRUCTION OF MOTOR VEHICLES

1. In general and present Federal law

Part I of title X is designed to deal with the offense of destruction of trucks. It is identical to a provision in S. 2572 as passed by the Senate in the 97th Congress. Present Federal law, 18 U.S.C. 33, covers the destruction or damage of motor vehicles if done with the intent to endanger the safety of anyone on board. The term motor vehicle is defined[1] as a conveyance used on the highways for commercial purposes in the "transportation of passengers or passengers and property." Thus, section 33 does not reach the destruction or damage of a truck which carriers only cargo, not passengers. Another statute[2] proscribes the actual or attempted destruction of cargo moving in interstate commerce, but is limited to the cargo itself, not the truck. Thus, there is no Federal statute proscribing, for example, the shooting at a truck and damaging it with intent to hurt or kill the driver, an occasional occurrence during certain labor disputes and at other times. The Committee believes there is a Federal interest in vindicating these offenses which often take place in remote areas where State law enforcement may not be effective. Moreover, there is a definite Federal interest in keeping open the channels of interstate commerce in which trucks play a critical role.

2. Provisions of the bill, as reported

Part I of title X amends the definition of the term "motor vehicle" in the second paragraph of 18 U.S.C. 31 to include a vehicle used for commercial purposes on the highways in the transportation of "passengers, passengers and property, or property or cargo." The phrase "property or cargo" is added to cover trucks. Thus, a person who destroys or damages a truck with intent to endanger the safety of the driver or any other person on board could be prosecuted under 18 U.S.C. 33. However, the Committee does not intend that Federal prosecution be the sole means of dealing with such a crime. Damaging a truck with the intent of injuring the driver would violate any of a number of State laws, and the Committee intends that State authorities continue to play a major role in this area.

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[1] 18 U.S.C. 31.

[2] 15 U.S.C. 1281.

PART J—DESTRUCTION OF ENERGY FACILITIES

1. In general and present Federal law

Part J of title X adds a new provision to Federal law to provide concurrent Federal jurisdiction over crimes involving serious damage to energy facilities. Included in the term energy facilities are facilities involved in the production, transmission, or distribution of electricty, fuel, or another form or source of energy, except a facility subject to the jurisdiction of the Nuclear Regulatory Commission. Electrical transmission lines and gas pipelines are examples of the type of property that would be covered. The provision is very similar to one included in S. 2572 as passed by the Senate in the 97th Congress and to S. 388, introduced in the present Congress by Senator Heflin.

Historically, damage to utility facilities has been a matter of concern for State and local law enforcement authorities. In recent years, however, acts of violence and sabotage against these facilities have been so widespread that some States have not been able to mount an adequate response. Moreover, the destruction of expensive facilities, such as electrical transmission towers, can occur in rural areas where law enforcement authorities are unable to deal with the situation and where the crime can affect the transmission of power into several other States. As Sentor Heflin stated in introducing S. 388: "On one project alone in Minnesota, some 10,000 insulators were shot out and over 15 towers toppled. The total cost of the damages was over $7 million, which translates into higher electric rates for the consumer."[1] The Committee has concluded that there is a role for the Federal Government in assisting to investigate and prosecute certain particularly serious crimes against energy facilities.

2. Provisions of the bill, as reported

Part J of title X adds a new section 1365 to title 18. It contains two offenses. The first, set out in subsection (a), covers whoever knowingly and willfully damages the property of an energy facility in an amount that exceeds $100,000 or damages the property of an energy facility so as to cause a significant interruption or impairment of the facility. The punishment for a violation of this subsection can extend to a fine of up to $50,000 and imprisonment for up to ten years.

Subsection (b) sets out an offense that is essentially a lesser included offense of that in subsection (a). It proscribes the knowing and willful destruction of an energy facility in an amount that exceeds $5,000, whether or not a significant impairment or interruption of its function occurs. The penalty for a violation of this subsection can extend to a fine of up to $25,000 and imprisonment for up to five years.

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[1] 129 Cong. Rec. S 895 (February 2, 1983 (daily ed.)).

No definition is provided for the term "significant interruption or impairment of a function of an energy facility," but the Committee intends that the term extend only to major disruptions, for example, damaging cables or pipelines so as to cause an outage or reduction of power to consumers of several hours duration. In general, the Committee does not anticipate that Federal authorities will become involved in an investigation or prosecution of a case under the new section unless the amount of damage exceeds the $5,000 base line amount set out in subsection (b), and that Federal involvement in this area will be on a selective, case-by-case basis.

Subsection (c) sets out a definition of the term "energy facility". It means "a facility that is involved in the production, storage, transmission, or distribution of electricity, fuel, or another form or source of energy, or research, development, or demonstration facilities relating thereto, regardless of whether such facility is still under construction or is otherwise not functioning, except a facility subject to the jurisdiction, administration, or in the custody of the Nuclear Regulatory Commission." The exception for facilities subject to the jurisdiction, administration, or in the custody of the Nuclear Regulatory Commission is due to the fact that damaging such facilities is already proscribed by another Federal statute.[2] Moreover it is not the purpose of the new section to involve the Federal Government in the demonstrations and disputes that occasionally occur near nuclear power plants.

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[2] 42 U.S.C. 2284, as amended by Public Law 97-415. The Committee is also aware that certain interstate gas transmission facilities are already covered by criminal prohibitions against acts of knowing and willful damage or destruction. See 49 U.S.C. 1679a(c). The Committee intends that such offenses normally be prosecuted under that more specific statute.

PART K—ASSAULTS UPON FEDERAL OFFICERS

1. In general and present Federal law

Part K of title X is similar to S. 2552, introduced by Senator Biden in the 97th Congress, to a provision in S. 2572 as passed by the Senate in that Congress and to S. 779 ordered reported by the Committee on June 16, 1983. It makes three amendments to 18 U.S.C. 1114, the present Federal statute which proscribes the murder of a long list of Federal officials while engaged in or on account of the performance of their official duties. Because of the cross-reference in 18 U.S.C. 111 to the persons designated in section 1114, assaults on all of the persons covered in section 1114 are also covered.[1]

The first amendment is the addition of an attempt provision to section 1114. At present, there is no attempt provision in Federal law applicable to the offenses of murder or assault of the covered officials. The lack of an attempt provision for section 1114 is particularly anomalous in light of the fact that the other principal sections in chapter 51 of title 18 dealing with homicide have attempt provisions.[2]

The second amendment to section 1114 made by Part K is the inclusion of probation officers, pretrail services officers, and intelligence agency employees in the list of the persons covered. The Committee is of the view that there is a strong need to give intelligence personnel the same type of protection against murder and assault as is presently afforded to many other types of Federal employees. Both senior intelligence officials and lower level employees are the occasional targets of terrorists and others who learn of their intelligence affiliation. However, under present law there is no basis for Federal prosecution of such crimes. Moreover, coupled with the addition of the attempt provision to section 1114, the addition of intelligence employees to the list of those covered would allow Federal criminal investigation in cases where evidence is received indicating that an assault on or murder of such a person is about to occur. Similarly, probation and pretrial services officers are routinely exposed to dangerous situations and hostile circumstances that justify Federal homicide and assault coverage.

The third change in section 1114 made by Part K is to give authority to the Attorney General to designate by regulation other classes of Federal officers and employees for coverage under the section. This change, which was also proposed in S. 1630, the Criminal Code Reform bill reported by the Committee in the 97th Congress, would provide a workable mechanism for extending Federal protection to miscellaneous classes of persons as changing needs dictate without the necessity of having to amend the statute.

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[1] Part F of this title would amend the Federal kidnaping statute, 18 U.S.C. 1201, to make a similar cross-reference to section 1114 and thus protect the persons listed from kidnaping.

[2] 18 U.S.C. 1113 covers attempted murder or manslaughter in the special maritime and territorial jurisdiction, while section 1116 provides an attempt provision for the murder or manslaughter of foreign officials.

2. Provisions of the bill, as reported

Part K of title X first amends section 1114 of title 18 by inserting the phrase "or attempts to kill" after the word kills in the first clause of the section so that attempts to kill any person in the list of designated classes of persons that follows would be covered. As with the actual killing, the attempt would have to be while the victim was engaged in or on account of the performance of his official duties. To constitute an attempt under this section, the defendant must engage in conduct with the intention of killing the victim and the conduct must constitute a substantial step toward the killing.[3] The Committee does not intend that the obsolete doctrine of impossibility be available here.[4] The penalty for attempted murder may extend to twenty years of imprisonment.

Part K also adds the phrase "any United States probation or pretrial services officer, or any officer or employee of any department or agency within the Intelligence Community (as defined in section 3.4(F) of Executive Order 12333, December 8, 1981, or successor orders) not already covered under the terms of this section." The reasons for the addition of probation officers, pretrial service officers, and intelligence employees to the list of persons protected have been discussed previously. Agencies within the Intelligence Community by virtue of section 3.4(F) of Order 12333[5] are the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs; the Bureau of Intelligence and Research of the Department of State; the intelligence elements of the Army, Navy, Air Force, and Marine Corps; the FBI; the Department of the Treasury; and the Department of Energy; and the staff elements of the Director of Central Intelligence.

Part K also adds a provision to section 1114 allowing the Attorney General to designate other classes of persons for coverage under the section pursuant to regulations as the need arises. The Committee intends that the Attorney General will designate only those persons who perform duties similar to those of the persons already listed or added by Part K whose jobs bring them into situations of possible hostile encounters with the public,[6] or whose work could result in violent retaliation or could subject them to an attack because of its symbolic nature.[7]

Finally, Part K also makes a technical correction in section 1114 by removing the phrase "while engaged in the performance of his official duties, or on account of the performance of his official duties," which appears about three quarters of the way down the list of protected persons. The phrase is redundant because it is repeated at the end of the section and applies to all the persons listed and added by Part K. As indicated, the Committee does not intend to eliminate the official duty nexus presently applicable.[8]

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[3] See S. Rept. No. 97-307, pp. 163-165.

[4] Id. at 166-167.

[5] See 3 CFR p. 215 (1982).

[6] E.g., certain employees in the Census Bureau.

[7] E.g., certain attorneys in the Civil Rights Division or the Organized Crime Section of the Department of Justice.

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[8] See the discussion of what constitutes the performance of official duty in connection with Part F, supra.

PART L—ESCAPE FROM CUSTODY RESULTING FROM CIVIL COMMITMENT

1. In general and present Federal law

Part L of title X creates a new offense of escape from civil confinement ordered either for a refusal to testify before a court or grand jury or as a result of a finding of not guilty by reason of insanity.[1]

Under present law, 28 U.S.C. 1826, a judge may order confined any person who, without just cause, refuses to testify before a Federal court or grand jury. Such confinement may extend for the life of the court proceeding or the term of the grand jury. Under present law, persons who escape or who attempt to escape from confinement as a result of such an order cannot be prosecuted, inasmuch as the general Federal escape statute, 18 U.S.C. 751, is limited to escapes from custody or confinement by virtue of an arrest or conviction. This freedom from any criminal sanction against an escape attempt even extends to persons already serving Federal prison sentences who are called to testify at a trial or grand jury. If such a prisoner refuses to testify and is ordered civilly committed the criminal sentence is suspended for the duration of the civil commitment to ensure that the civil commitment extends the period of confinement pursuant to the criminal sentence.[2] In effect a recalcitrant prisoner witness who is confined for his refusal to testify is given a "free shot" at making an escape while confined pursuant to 28 U.S.C. 1826.[3] Since such confinement is often in a local jail facility which may not be as secure as a Federal prison, the incentive to try to escape is strong.

Under present Federal law there is no provision for a verdict of not guilty by reason of insanity and, outside of the District of Columbia, no provision for the automatic civil commitment of a person who successfully raises an insanity defense. These defects will be corrected by title IV of the bill as reported, and a person acquitted by reason of insanity will be automatically committed to a mental health facility for an examination prior to a hearing within forty days to determine whether he is presently suffering from a mental disease or defect and is presently dangerous. If the court makes a finding that due to mental disease or defect the person's release would pose a danger to another person or to the community, the court must commit the person to the custody of the Attorney General, who must then attempt to have the appropriate State assume responsibility for the person's custody. The Committee believes that there is a need to provide a criminal sanction for persons who are confined for an examination pursuant to a verdict of not guilty by reason of insanity who escape either before the hearing to determine present mental illness and dangerousness, or who escape after the hearing but before transfer to State authorities or after an ultimate order of detention by the Attorney General if no State will assume responsibility for a dangerously insane acquittee.

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[1] See the discussion of title IV of this bill for an analysis of this new special verdict and of the automatic commitment for purposes of a mental examination to determine present insanity and dangerousness of persons as to whom such a verdict is returned.

[2] See 28 CFR 522.11(d).

[3] 18 U.S.C. 751 has recently been held not to apply in this situation. See *United States* v. *Brown and Grandstaff*, Cr. No. 82-0358, D. Ariz.

2. Provisions of the bill, as reported

Part L of title X adds a new subsection (c) to section 1826 of title 28. It provides that anyone who escapes or attempts to escape from the custody of any facility or from any place in which, or to which, he is confined pursuant to that section or new section 4243 of title 18, added by title IV of this bill, is subject to imprisonment for up to three years and a fine of up to $10,000. The new subsection also covers persons who rescue, or attempt to rescue, persons confined pursuant to section 1826 or new section 4243 or who aid or assist the escape or attempted escape of such persons. All such would be subject to three years of imprisonment and a $10,000 fine.

Part L is drafted so as to parallel the provisions of 18 U.S.C. 751, and the Committee intends that the general scienter elements of the latter statute apply here.[4] The reasons for the addition of the new subsection have been previously discussed. With respect to escapes of persons who are confined pursuant to new section 4243, the Committee intends that the provisions of this part apply beginning at the moment the verdict of not guilty by reason of insanity is announced, continue through the period of confinement up to the forty day hearing required by new subsection 4243(c), and thereafter—if the person is found to have a mental disease or defect rendering him presently dangerous—until a State agrees to assume responsibility for the person and takes physical custody of him or—if no State will accept custody of the person—until he is released unconditionally by the Attorney General. In this connection, the Committee intends that a person be considered as still in the custody of a facility or place to which he is confined even if he is receiving treatment on an outpatient basis. In short, the Committee accepts and intends the applicability to Part L of the holdings of many cases under 18 U.S.C. 751 to the effect that for a violation of that statute "it is not necessary that the escapee at the time of the offense be held under guard or under direct physical restraint or that the escape be from a conventional penal housing unit such as a cell or cell block; the custody may be minimal and indeed, may be constructive."[5]

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[4] See *United States* v. *Bailey*, 444 U.S. 394 (1980).

[5] See *United States* v. *Cluck*, 542 F.2d 728, 731 (8th Cir. 1976) and cases therein cited. The Committee also intends that this broad concept of custody be applicable to escape from custody ordered pursuant to 28 U.S.C. 1826. For example, a recalcitrant grand jury witness who was ordered to spend nights and weekends in a halfway house, or in his own house but failed to do so would be in violation of the new subsection.

PART M—EXTRADITION REFORM

INTRODUCTION

Part M of title X of this bill deals with international extradition procedures. It was originally developed in the context of efforts to modernize the Federal criminal code, but was eventually introduced and processed in the Senate in the 97th Congress as separate legislation, S. 1940.[1] This Part is substantively the same as S. 1940 as it passed the Senate last Congress.

This Part would significantly modernize the procedures in an area of Federal criminal law of growing importance as the United States undertakes to meet the challenges of international crime, particularly international terrorism and drug trafficking. International extradition is the process by which a person located in one nation is arrested and turned over to another nation for criminal trial or punishment.

The provisions of this Part substantially alter the present statutory law for several reasons.

First, many of the statutes on extradition have been in force without major alteration since 1882. Several have not been significantly changed since 1848. These antiquated provisions have proven increasingly inadequate in dealing with the modern problems in the international control of crime.

Second, there has been a marked increase in the number of extradition requests received and made by the United States in recent years. Those requests have revealed problems in the extradition process. Moreover, the requests have generated a number of published court decisions on constitutional and legal issues involved in international extradition. The judicial interpretation of the law contained in these court decisions fills important gaps in the present statutory law, *and should be reflected* in any new extradition legislation.

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[1] The provisions of Part M were originally proposed as an amendment to S. 1722—the pending Federal criminal code bill in the 96th Congress—after several years of study by the Department of Justice and Department of State in conjunction with the professional staff of the Senate Committee on the Judiciary (see Printed Amendment No. 2373 to S. 1722, 126 Cong. Rec. S 13233-S 13243 (September 23, 1980, daily ed.)). In the 97th Congress, the provisions were included in the criminal code bill (see, S. 1630, subchapter B of chapter 32; S. Rept. No. 97-307, 97th Cong., 1st Sess. (1981)) and also introduced as separate legislation.

With respect to the separate legislation, Senator Thurmond introduced S. 1639 on September 18, 1983. Following hearings on the bill *Extradition Act of 1981*. Hearings before the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. (1981) (hereinafter cited as Extradition Hearings)), Senator Thurmond introduced a clean bill—S. 1940—to incorporate several amendments suggested in the hearings, as well as to make a number of clarifying amendments. The Committee reported S. 1940, with amendments, on April 15, 1982 (S. Rept. No. 97-331, 97th Cong., 2d Sess. (1982)). It was then referred to the Senate Committee on Foreign Relations for consideration of the "political offense exception" to extradition and related provisions. The Committee on Foreign Relations reported the bill back to the Senate, with amendments, on May 19, 1982 (S. Rept. No. 97-475, 97th Cong., 2d Sess. (1982)). The Judiciary Committee bill, as further amended by the Foreign Relations Committee, passed the Senate on August 19, 1982 (128 Cong. Rec. S 10880-S 10884 (daily ed.)). Separate legislation, S. 220, has also been introduced this Congress by Senator Thurmond.

A companion bill differing in significant respects with the Senate measure (H.R. 6046) was reported by the House Committee on the Judiciary (H. Rept. No. 97-627, Part I, 97th Cong., 2d Sess. (1982)) and the House Committee on Foreign Affairs (H. Rept. No. 97-627, Part II, 97th Cong., 2d Sess. (1982)); but no further action was taken by the House. In the 98th Congress, the House Subcommittee on Crime has reported an extradition bill (H.R. 3347) differing significantly with this Part. That measure is awaiting action by the full House Committee on the Judiciary.

Third, the United States has concluded new extradition treaties with many foreign countries in the past few years. The language of the present law is not adequate to fully implement some of the provisions of the new treaties, and therefore impedes fulfillment by the United States of its international obligations.

In summary, the following significant improvements in international extradition are accomplished by this Part:

(1) Permits the United States to secure a warrant for the arrest of a foreign fugitive even though the fugitive's whereabouts in the United States is unknown or even if he is not in the United States. This warrant can then be entered into the FBI's NCIC system so that if the fugitive attempts to enter the United States or is apprehended in the United States for other reasons, he can be identified and arrested immediately for extradition to the requesting country.

(2) Provides a statutory procedure for waiver of extradition. This feature protects a fugitive's rights while facilitating his removal to the requesting country in instances in which he is willing to voluntarily go to the requesting country without a formal extradition hearing.

(3) Permits both a fugitive and the United States on behalf of the requesting country to directly appeal adverse decisions by an extradition court. Under present law a fugitive can only attack an adverse decision through habeas corpus. The only option available to the United States acting on behalf of a requesting country is to refile the extradition complaint with another magistrate.[2]

(4) Clarifies the applicable standards for bail at all stages of an extradition case by adopting standards largely derived from Federal court cases.

(5) Establishes clear statutory procedures and standards applicable to all critical phases of the handling and litigation of a foreign extradition request.

(6) Makes the determination of whether the requesting country is seeking extradition of a person for a "political offense" a matter for the courts consistent with statutory guidelines.

(7) Limits access to United States courts in connection with foreign extradition requests to cases initiated by the Attorney General.

(8) Permits use of a summons instead of a warrant of arrest in appropriate cases.

(9) Codifies the rights of a fugitive to legal representation and to a speedy determination of an extradition request.

(10) Simplifies and rationalizes the procedures for authenticating documents for use in extradition proceedings.

(11) Facilitates temporary extradition of fugitives to the United States.

Chapter 209 of current title 18 of the United States Code (18 U.S.C. 3181-3195) entitled "Extradition" covers both interstate rendition and international extradition. Section 1014 of this Part would retain chapter 209 for interstate rendition provisions. Section 1015 of this Part creates a new chapter 210 for international extradition laws. The new chapter 210 consists of eight sections. Sections 3191 through 3196 deal primarily with requests made to the United States by foreign governments and set forth the procedure for determining whether a person located in this country should be delivered up to a foreign power. Section 3197 deals with the return of a fugitive extradited to the United States from a foreign nation. Section 3198 contains definitions and a provision on payment of the expenses incident to extradition. The proposed chapter replaces 18 U.S.C. 3181 and 3184–3195. Other Federal statutes on extradition, which include 18 U.S.C. 751, 752, and 1502, are not affected by this legislation.

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[2] *United States* v. *Mackin*, 668 F.2d 122 (2d Cir. 1981).

PROVISIONS OF THE BILL AS REPORTED

SECTION 3191. EXTRADITION AUTHORITY IN GENERAL

1. Present Federal law

18 U.S.C. 3181 states that the present Federal laws authorizing the extradition of persons from the United States shall continue in force only if there is a treaty in force with the foreign nation requesting extradition. 18 U.S.C. 3184 requires that an extradition treaty be in force before any court can conclude that a person may lawfully be extradited to the foreign country involved. In addition, 18 U.S.C. 3186 by implication requires that a court find that the person sought is extraditable before the Secretary of State may order surrender to the foreign state. These provisions, read together, permit the United States to surrender a person to a foreign country only in accordance with an applicable treaty in force between the United States and the foreign country involved.[3] This principle has become a settled aspect of United States practice in international extradition.

2. Provisions of the bill, as reported

Section 3191 of the proposed chapter on extradition carries forward the basic principle of the present law. The provision specifies that the United States may extradite a person in this country only if there is a treaty concerning extradition in force with the country requesting extradition, and only if the request falls within the terms of that treaty. This section refers to a treaty "concerning extradition" rather than an "extradition treaty" because an obligation to extradite a particular class of offenders is sometimes included in international agreements other than extradition treaties.[4]

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[3] *Valentine* v. *U.S. ex rel. Neidecker*, 299 U.S. 5 (1936); *Argento* v. *Horn*, 241, F.2d 258, 259 (6th Cir. 1957), *cert. denied* 355 U.S. 818 (1957); *Ivancevio* v. *Artukovic*, 211 F.2d 565, 566 (9th Cir. 1954) *cert. denied*, 348 U.S. 818 (1954); Evans, *Legal Basis for Extradition in the United States*, 16 New York Law Forum 525, 529–530 (1980); 6 Whiteman, Digest of International Law 727 (1968).

[4] See e.g., Art. 14, Amending Protocol to the 1961 Single Convention on Narcotic Drugs, done at Geneva, March 24, 1972, 26 U.S.T. 1439, T.I.A.S. 8118 (entered into force for the United States August 8, 1975); Art. 8, Convention on Suppression of Unlawful Seizures of Aircraft, done at The Hague, December 16, 1970. 22 U.S.T. 1641, T.I.A.S. 7192 (entered into force for the United States October 14, 1971); Art. 8, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done at New York, December 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532 (entered into force for the United States February 20, 1977).

However, the limitation established by this section applies only to the surrender of fugitives pursuant to the chapter, and does not apply to any other legal process which may result *in a person* facing trial or punishment in another country. Thus, the surrender of a United States serviceman to foreign authorities for trial in accordance with the reciprocal criminal jurisdiction provisions of a Status of Forces Agreement,[5] or the deportation of an alien who happens to face criminal charges abroad,[6] remain governed by the treaty provisions and statutes relating to those processes, and not by this chapter.

SECTION 3192. INITIAL PROCEDURE

This section sets forth the steps to be followed in instituting court proceedings necessary for extradition.

1. Present Federal law

Extradition proceedings under 18 U.S.C. 3184 commence when a complaint is filed, under oath, charging that a person has committed, within the jurisdiction of a foreign government, any of the crimes for which extradition is provided under the treaty on extradition in force between the United States and that foreign government. There is no requirement under present law that a formal diplomatic request for extradition be made before the complaint is filed.

18 U.S.C. 3184 permits any Federal judge or justice, or duly authorized Federal magistrate, or any judge of a State court of record of general jurisdiction to receive complaints and issue warrants of arrest in international extradition matters. In practice, however, such cases are almost invariably filed in the Federal courts.

The present statutory scheme does not specify by whom a complaint may be filed in extradition matters. The rule developed by the courts appears to be that any person acting under the authority of the demanding government may file a complaint for extradition.[7] Thus, international extradition cases have been instituted by foreign diplomatic or consular representatives,[8] foreign policy officers[9] and even private citizens who claim to be acting on behalf of a foreign government.[10] This situation has required the courts to determine, in each case, whether the person filing the complaint is "authorized" to act on behalf of the foreign government.[11] However, in recent years, the United States Department of Justice has become the complainant in the overwhelming majority of extradition cases. The Department of Justice takes this action either pursuant to provisions in the applicable extradition treaty requiring the government of the requested state to provide assistance to the government seeking extradition[12] or pursuant to an informal international agreement for reciprocal legal representation.

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[5] See. e.g., *Holmes* v. *Laird*, 459 F.2d 1211, 148 U.S. App. D.C. 187 (D.C. Cir. 1972), *cert denied*, 409 U.S. 869 (1972); *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

[6] See, e.g., *Kalatijis* v. *Rosenberg*, 305 F.2d 249 (9th Cir. 1962).

[7] 6 Whiteman, *supra* note 3, at 935.

[8] *United States ex rel Caputo* v. *Kelley*, 92 F.2d 603 (2nd Cir. 1937), *cert, denied*, 303 U.S. 635 (1938); *Ornelas* v. *Ruiz*, 161 U.S. 502 (1896); *Castro* v. *DeUrierte*, 12 Fed. 250 (S.D. N.Y. 1882). See, generally, 6 Whiteman, *supra* note 3, at 935; Note, *United States Extradition Proceedings*, 16 New York Law Forum 420, 432 (1980).

[9] 1 Moore, a Treatise on Extradition and Interstate Rendition, 410–415, (1891).

[10] See, e.g., *Schoenbrun* v. *Drieband*, 268 F. Supp. 332 (E.D. N.Y. 1967).

[11] See, e.g., *United States ex rel. Caputo* v. *Kelley*, *supra* note 8.

The complaint must be filed in a Federal or State court in whose jurisdiction the fugitive may be found. Unfortunately, in many cases the international fugitive's location in the United States is unknown. Therefore, no complaint can be filed and no arrest warrant can be issued. The ability of United States law enforcement agencies to locate and apprehend international fugitives is greatly hampered by the lack of an outstanding arrest warrant or other judicial process in such cases.[13]

The present statutory scheme contains no provision for the release of an alleged fugitive on bail pending the extradition hearing.[14] However, the courts have claimed the inherent right to release an alleged fugitive on bail pending the extradition hearing in cases where "special circumstances" require such release.[15] The standard for release on bail in extradition cases is more demanding than in ordinary cases, and a clear presumption against bail is recognized.[16]

2. Provisions of the bill, as reported

Subsection (a) permits the Attorney General to file a complaint charging that a fugitive is extraditable in the United States district court for the district in which the fugitive may be found. The subsection also permits a complaint to be filed in the United States District Court for the District of Columbia if the fugitive's location is not known. Under this provision, a complaint could be filed, and an arrest warrant issued, when the whereabouts of the fugitive in the United States are still being ascertained, or when it is believed that the fugitive has not yet entered the United States but may be about to do so. The word "found" is intended to have its usual, nontechnical meaning, and permits extradition proceedings to be initiated in any district in which the fugitive can be physically apprehended, without regard to the manner in which the fugitive entered the district.[17]

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[12] *In re David*, 395 F. Supp. 803, 807 (E.D. Ill. 1975); *United States ex rel. Petruschansky* v. *Marasco*, 215 F. Supp. 953. 957 (E.D. N.Y. 1963), aff'd, 325 F.2d 562 (2nd Cir. 1963), *cert. denied*, 376 U.S. 952 (1964).

[13] For example, many Federal, State, and local law enforcement agencies rely on the FBI's National Crime Information Center—"NCIC"—in determining whether an individual is wanted for arrest in another jurisdiction. Since no complaint for extradition can be filed against a fugitive whose location is unknown, there can be no Federal arrest warrant issued, and no information on the person will appear in NCIC. Thus, law enforcement officers may have no way to learn that a particular person is an international fugitive sought for extradition.

[14] In *Wright* v. *Henkel*, 190 U.S. 40 (1903), the Supreme Court reviewed former section 596 of title 18 (now 18 U.S.C. 3141) in conjunction with former section 591 (now 18 U.S.C. 3041), and concluded that there was no statute providing for admission to bail in cases of foreign extradition. The Bail Reform Act (which amended Sections 3041, 3141–3143, and 3568, and enacted 18 U.S.C. 3147–3152) did not alter this result. The Act liberalized access to bail in those cases to which the bail statutes apply, but did not broaden the availability of bail generally. Both the previous sections of the law and the provisions of the Bail Reform Act apply only to "person(s) charged with an offense," and the term "offense" is expressly defined in 18 U.S.C. 3156 as "any criminal offense * * * which is in violation of any Act of Congress and is triable in any court established by Act of Congress * * *". Since fugitives facing extradition to a foreign country are not accused of any Federal criminal offense, and will not be tried in any Federal court, the bail statute's provisions do not apply to them. *Cf. Kelley* v. *Springette*, 527 F.2d 1090, 1093 (9th Cir. 1975); *Beaulieu* v. *Comm'r of Massachusetts*, 382 F.2d 290 (1st Cir. 1967).

[15] *United States* v. *Williams*, 611 F.2d 914 (1st Cir. 1979); *Beaulieu* v. *Hartigan*, 554 F.2d 1 (1st Cir. 1977); *Wright* v. *Henkel*, *supra* note 14.

[16] *Hu Yan-Leung* v. *Soscia*, 649 F.2d 914 (2d Cir. 1981).

Subsection (b) prescribes the contents of a complaint for extradition. Since all United States extradition treaties specify the documents and quantum of evidence necessary for surrender, paragraph (1) states that an extradition complaint is sufficient if it is accompanied by the evidence specified in the treaty and a copy of the formal request for extradition. Paragraph (2) deals with the documentation necessary to support a "provisional arrest," the process by which a fugitive from justice is arrested to prevent further flight while the foreign government seeking extradition assembles the necessary documents and evidence.[18] Subparagraph (A) of paragraph (2) provides that a complaint will support an arrest under subsection (c) if it contains information sufficient to identify the fugitive, explains the circumstances necessitating provisional arrest,[19] and either indicates that a warrant for the fugitive's arrest is outstanding in the foreign state,[20] or outlines the essential facts indicating that an extraditable crime has been committed and that the fugitive committed it. Since many of the extradition treaties contain articles which expressly set out requirements for obtaining the arrest of fugitives,[21] subparagraph (B) of paragraph (2) also permits the complaint to be filed if it contains the information required by the provisions of the applicable treaty.

Subsection (c) obliges the court to issue a warrant for the arrest of the fugitive upon receipt of the complaint unless the Attorney General requests that a summons to appear at the extradition hearing be issued instead. The subsection requires that the warrant of arrest be executed in accordance with Rule 4(d) of the Federal Rules of Criminal Procedure. This means that the warrant may be executed anywhere in the United States in the same manner as an ordinary Federal warrant of arrest. The subsection also requires that the person arrested be taken without unnecessary delay before the nearest available Federal court[22] for an extradition hearing. The language is similar to that of Rule 5 of the Federal Rules of Criminal Procedure, and is intended to insure that the person arrested under this section is speedily informed by a judicial officer of the reason for the arrest and of his rights to counsel, to cross-examine witnesses, and to introduce evidence on his behalf. It is not intended to require the dismissal of extradition proceedings solely on the ground that the fugitive arrested for extradition was taken without unnecessary delay before a judge or magistrate later determined not to be the "nearest" one. There is no requirement that the extradition hearing take place in the State in which the fugitive is found,[23] so long as there has been compliance with the provisions of this chapter.

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[17] See, *In re Chan Kam-Shu*, 477 F.2d 333 (5th Cir. 1973), *cert. denied*, 414 U.S. 847 (1973); *Vardy* v. *United States*, 529 F.2d 404 (5th Cir. 1976), *rehearing denied*, 533 F.2d 310 (5th Cir. 1976); *In re David*, 390 F. Supp. 521 and 395 F. Supp. 903 (E.D. Ill. 1975).

[18] Provisional arrest is a well-recognized aspect of international extradition procedure, and is specifically provided for in most of the extradition treaties to which the United States is a party. See, e.g. Art. 11, Extradition Treaty, United States-Canada; signed Dec. 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976). See generally, Reuschlein, *Provisional Arrest and Detention in International Extradition*, 23 Georgetown Law Journal 37 (1934); Note, 16 New York Law Forum 420, 429–430 (1970).

[19] E.g., contains an indication that the fugitive is likely to flee the jurisdiction and be unavailable by the time the extradition documents arrive.

[20] See, 6 Whiteman, *supra* note 3, at 931; *Whitely* v. *Warden, Wyoming State Penitentiary*, 401 U.S. 560, 568 (1970); *United States* v. *McCray*, 468 F.2d 848 (5th Cir. 1967).

[21] See, e.g., *Caltagirone* v. *Grant*, 629 F.2d 739 (2d Cir. 1980).

[22] "Court" is defined in section 3198(a)(1) to mean a United States district court established pursuant to 28 U.S.C. 132, or the District Court of Guam, the Virgin Islands, or the Northern Mariana Islands, or a United States magistrate authorized to conduct an extradition proceeding.

Subsection (d)(1) provides that a fugitive arrested for extradition may be released on bail pending the extradition hearing only if he can demonstrate that "special circumstances" warrant his release. The provision continues the approach which has been followed by the United States courts [24] in setting the standards for release on bail pending an extradition hearing considerably higher than the standards for release on bail pending trial on Federal charges in the United States. This approach is necessary to assure that the United States continues to carry out its treaty obligation to surrender extraditable fugitives. It is anticipated that the courts will find the "special circumstances" test satisfied "only in the most pressing circumstances and only when the requirements of justice are absolutely peremptory." [25] Such special circumstances might be found, for instance, when the incarceration of the fugitive would seriously damage his health,[26] or would endanger the welfare of a third party who is wholly dependent upon the fugitive for care.[27] It is anticipated that these circumstances would rarely be encountered.

Subsection (d)(3) provides that even if special circumstances are found, the release of the fugitive shall be permitted only upon such conditions as will reasonably assure his appearance at future proceedings, and assure the safety of other persons and the community. Such conditions might include surrender by the fugitive of any passport or travel documents, posting of a substantial bond, and the requirement that the fugitive maintain contact with appropriate Federal agencies, such as the United States Marshals Service.

Subsection (d)(2) gives the court the discretion to release the fugitive provisionally arrested pursuant to this section if the evidence or documents required by the applicable treaty are not received within sixty days of the arrest (unless a longer period of detention is specified in the applicable treaty). The subsection resolves an ambiguity perceived by the courts with respect to the commencement and conclusion of the time period for provisional arrest by providing that this period should be calculated from the date on which the fugitive is taken into custody for extradition[28] to the date on which the documents are received by either the court or the Department of State.[29] If the court is notified that the documents have been received by the Department of State before the expiration of the 60-day period, the court is directed to defer release of the fugitive for a reasonable time pending the prompt transmission of the documents to the court by the Department of State. If a court does release the fugitive from custody due to the non-receipt of the documents within the applicable time period, subsection (d)(3) requires that the court frame conditions of release reasonably calculated to assure that person's appearance for future proceedings and the safety of other persons and the community. Release of the fugitive under subsection (d) does not terminate the proceedings, which can resume once appropriate documentation arrives.[30]

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[23] Thus, the section eliminates the arbitrary rule created by the Supreme Court in *Pettit* v. *Walshe,* 194 U.S. 205 (1904). See note 40, *infra,* and accompanying text. This rule is unnecessary in light of proposed section 3194(c)(3).

[24] See notes 15 and 16, *supra.*

[25] *In re Mitchell,* 171 Fed. 289, 290 (S.D. N.Y. 1909).

[26] See, e.g., *In re Kaplan,* Civ. No. 79-2219 RF (C.D. Cal. July 29, 1979).

[27] See, e.g., *In re Itoka,* Misc. No. 79-1536-M (D. N.M. Dec. 17, 1979).

[28] See, *In re Chan Kam-Shu,* 477 F.2d 333, 339-340 (5th Cir. 1973) *cert. denied,* 414 U.S. 847 (1973).

[29] *United States* v. *Clarke,* 470 F. Supp. 979 (D. Vermont 1979).

This section does not carry forward the little used authorization in 18 U.S.C. 3184 for extradition proceedings to be commenced before State judges. The section also specifies that extradition proceedings must be initiated by the Attorney General, rather than by a foreign government or one acting on behalf of a foreign government.[31] These changes reflect the fact that international extradition is strictly a function of the Federal Government,[32] and determining when and how to perform that function is properly the business of Federal officials and Federal courts. The United States Government has a sufficient interest in the vigorous enforcement of the laws (including the extradition law and treaties) to justify the participation of its legal counsel, the Department of Justice, in all court proceedings aimed at determining whether extradition can take place. Indeed, this is the approach which has been adopted in most foreign countries, many of which do not permit the United States to argue in court during proceedings in connection with a United States extradition request. In addition, United States courts are freed from any need to determine whether a private person is "authorized" by an "appropriate" foreign authority to initiate extradition proceedings. It should also significantly reduce the likelihood of extradition proceedings being used by private individuals as a tool for harassment, debt collection, or other improper purposes.

SECTION 3193. WAIVER OF EXTRADITION HEARING AND CONSENT TO REMOVAL

1. Present Federal law

Present Federal law provides no specific procedure by which a person arrested for extradition may waive the formalities and voluntarily return to the foreign country requesting surrender. This is especially unfortunate since a significant number of the fugitives arrested under 18 U.S.C. 3184 choose not to challenge the request for extradition and wish to expedite removal to the foreign country. Moreover, many of the newer extradition treaties to which the United States is a party contain provisions obliging the requested

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[30] E.g., Art. 13(2), Extradition Treaty, United States-Norway, signed June 9, 1977, — U.S.T. —, T.I.A.S. 9679 (entered into force March 6, 1980).

[31] It is anticipated that in most cases the Attorney General will act through the United States attorney for the district in which the fugitive is located. If the foreign government involved feels the need to participate in the judicial proceedings, it can retain counsel and seek to enter the case as *amicus curiae*.

[32] *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936); *United States* v. *Rauscher*, 119 U.S. 407, 414 (1886).

State to expedite the return of a fugitive who has waived a hearing or other procedures.[33]

2. Provisions of the bill, as reported

Section 3193 of the proposed extradition chapter clarifies the method by which the fugitive who does not contest extradition can expedite his surrender. The provisions of this section are based on Federal statutory provisions governing a closely analogous situation: the verification of a prisoner's voluntary consent to transfer to his country of nationality under treaties on the execution of penal sanctions.[34] The section states that the court which would have handled the extradition proceeding shall verify that the fugitive's consent to be removed to a foreign country has been given voluntarily and with full knowledge of his right to consult with counsel before making a decision in the matter.

Under some circumstances, the foreign government may not be willing to accept custody of a fugitive who has offered to waive extradition.[35] There also may be situations in which the United States government would consider waiver inappropriate.[36] Therefore, the provision does not permit removal of the fugitive if the Attorney General notifies the court that the United States or the foreign state objects to the proposed waiver.

SECTION 3194. EXTRADITION HEARING

1. Present Federal law

Under 18 U.S.C. 3184, an alledged fugitive is entitled to a hearing at which a judicial officer determine whether extradition is lawful. 18 U.S.C. 3189 specifies that the hearing must be held "on land, publicly, and in a room or office easily accessible to the public".

At the extradition hearing, the judicial officer must determine whether the offense for which extradition is sought falls within the terms of the treaty. He must also determine whether the acts for which the fugitive is sought by the foreign country would constitute a crime had they been committed in this country. This rule, known as "dual criminality" or "double criminality," is generally considered a basic principle of international extradition law,[37] and is expressly required by many of the extradition treaties to which the United States is a party.[38] The courts have held that the double criminality requirement is satisfied whenever the acts which the fugitive is charged with having committed in the foreign country would be punishable under Federal law, the law of the State where the fugitive is found, or the laws of a majority of the States, had those acts been committed in this country.[39]

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[33] See e.g., Art. 10, Extradition Treaty, United States-Japan, signed March 3, 1978, — U.S.T. —, T.I.A.S. 9625 (entered into force March 25, 1980); Art. 18, Extradition Treaty, United States-Mexico, signed May 4, 1978, — U.S.T. —, T.I.A.S. 9656 (entered into force January 24, 1980).

[34] See 18 U.S.C. 4107–4108.

[35] For example, a fugitive might wish to waive extradition on only one of many outstanding charges against him in the requesting state. Under these circumstances, that foreign state might conceivably prefer to have extraditability determined as to all of the charges.

[36] For example, many extradition treaties permit the requested state to postpone extradition until the person sought has been tried and punished for criminal charges outstanding in that state. A person facing criminal charges or imprisonment in this country might well attempt to expedite his extradition to a foreign country where less serious charges are pending, in order to avoid prosecution or punishment here. In such circumstances, it would not be appropriate for the United States to permit expedited surrender, at least not until the charges in this country have been resolved or the sentence served.

[37] Shearer. Extradition in International Law, 137–141 (1971); 6 Whiteman *supra* note 3, at 773–779; *Freedman* v. *United States*, 437 F. Supp. 1252, 1263 (N.D. GA. 1977).

[38] See. e.g., Art. 2(1). Extradition Treaty, United States-Japan, signed March 3, 1978,— U.S.T.—. T.I.A.S. 9625 (entered into force March 25, 1980).

A judicial officer must also determine whether there is sufficient proof that an extraditable offense in fact has been committed. Most of the treaties to which the United States is a party require that an extradition request be supported by "such evidence of criminality as, according to the laws of the place where the fugitive shall be found, would justify his commitment for trial had the crime or offense been there committed." Many years ago, the courts viewed the words "place where the fugitive shall be found" as requiring the Federal court to determine if the foreign government's evidence is sufficient to justify a trial under the State laws of the State in which the fugitive is apprehended.[40] This approach was a reasonable one eight decades ago, because at that time Federal courts had no uniform rules of criminal procedure and routinely followed the procedural rules of the courts of the State in which they were located. However, the adoption of the Federal Rules of Criminal Procedure has made it generally unnecessary for Federal courts to refer to State law in these matters.[41] Moreover, extradition is a national act,[42] and the quantum of evidence necessary for extradition is precisely the kind of issue which should be determined by uniform national law, rather than by various State laws. For these reasons, all of the more recent extradition treaties contain language essentially requiring that the Federal law standard of commitment for trial—probable cause—be applied in weighing the sufficiency of the evidence for international extradition.[43]

The Federal Rules of Evidence do not apply in extradition proceedings,[44] where unique rules of wide latitude govern the reception of evidence on behalf of the foreign government.[45] It is settled law that hearsay is admissible, and the foreign government usually presents its case by submitting affidavits, depositions, and other written statements in order to satisfy the requirements of the applicable treaty.[46] 18 U.S.C. 3190 provides that originals or copies of depositions, warrants, or other papers are admissible in evidence at the extradition hearing if authenticated so as to be admissible for similar purposes according to the laws of the requesting country. The statute also provides that the certificate of the principal diplomatic or consular officer of the United States resident in the requesting country shall be proof that the documents are authenticated in the manner required. In essence, the documents need only be genuine and authentic—requirements that are deemed fulfilled once it is shown that under similar circumstances the requesting country's own courts would accept them as authentic. The courts have held that extradition documents bearing a certificate which is couched in the language of 18 U.S.C. 3190, and signed by one of the specified officials, are conclusively admissible.[47] As a result of these decisions, foreign governments routinely submit the documentation in support of extradition requests to the appropriate United States Embassy abroad for certification and transmission to the United States. This practice imposes undesirable burdens on the United States Foreign Service officers who must fill out the certification.[48]

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[39] *Cucuzella* v. *Keliikaa*, 638 F.2d 105 (9th Cir. 1981); *Brauch* v. *Raiche*, 618 F.2d 843, (1st Cir. 1980); *Freedman* v. *United States*, *supra* note 37, at 1252, 1263.

[40] *Pettit* v. *Walshe*, *supra* note 23; *see e.g.*, U.S. ex rel. *LoPizzo* v. *Mathews*, 36 F. 2d 565 (3d Cir. 1929); *U.S. ex rel Rauch* v. *Stockinger*, 170 F. Supp. 506 (E.D. N.Y. 1959), *aff'd* 269 F. 2d 681 (2d Cir. 1959), *cert. denied*, 371 U.S. 913 (1959); *O'Brien* v. *Rozmann*, 554 F. 2d 780 (6th Cir. 1977).

[41] *Greci* v. *Birkness*, 527 F.2d 956, 958, at note 3 (1st Cir. 1976); *Application of D'Amico*, 185 F. Supp. 925–930, at note 6 (S.D. N.Y. 1960), *appeal dismissed*, 286 F.2d 320 (2d Cir. 1960), *cert. denied*, 366 U.S. 963 (1962).

[42] 6 Whiteman, *supra* note 3.

[43] *Greci* v. *Birkness*, *supra* note 41; *Sindona* v. *Grant*, 461 F. Supp. 199 (S.D. N.Y. 1978); *Brauch* v. *Raiche*, *supra* note 39.

[44] *Sayne* v. *Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 390 U.S. 903 (1970).

[45] Rule 1101. Federal Rules of Evidence.

[46] The Supreme Court has indicated that requiring the foreign state to produce live witnesses in extradition hearings would tend to "defeat the whole object of the treaty." *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916); *see also*, *Collins* v. *Loisel*, 259 U.S. 309, 317 (1922); *Sayne* v. *Shipley*, *supra* note 44; *In re David*, *supra* note 12; *O'Brien* v. *Rozmann*, *supra* note 40.

The present statutory scheme offers little guidance with respect to the evidence which can be introduced on behalf of the alleged fugitive in an extradition hearing. Many cases emphasize that whether such evidence should be admitted is a decision for the court, in its discretion, to make.[49] The alleged fugitive is ordinarily permitted to testify on his own behalf[50] or to have witnesses testify for him.[51] However, it is clear from the case law that the alleged fugitive may offer to explain ambiguities in the evidence submitted against him, but may not offer evidence which merely contradicts that submitted by the requesting country, or which poses a question of credibility, or which raises an affirmative defense to conviction on the charges, or which is incompetent by the terms of the extradition treaty under which surrender is sought.[52] This restrictive approach is appropriate because the issue before the court at an extradition hearing is probable cause, not the ultimate guilt or innocence of the accused.

Finally, the judicial officer must determine whether the treaty contains a defense to extradition which would preclude surrender in the case before him. Extradition treaties frequently bar surrender if a statute of limitations has foreclosed prosecution or punishment for the offense in question,[53] or if the fugitive has been tried or punished in the requested state for the same offense,[54] or if any of several other legal considerations are present.

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[47] *United States* v. *Galanis,* 429 F.2d 1215, 1225–1229 (D. Conn. 1977), *rev'd on other grounds,* 568 F.2d 234, 240 (2d Cir. 1977); *Shapiro* v. *Ferrandina,* 478 F.2d 894, 903 (2d Cir. 1973); *In re Edmonson,* et al. 352 F. Supp. 22, 24 (D. Minn. 1972).

[48] The consular and diplomatic officers who must sign the certificate are usually not lawyers, and it is difficult for them to know whether the documents presented to them are in fact acceptable "for similar purposes" in the courts of the requesting state.

[49] *Freedman* v. *United States, supra* note 37; *U.S. ex rel. Petruschansky* v. *Marasco, supra* note 12.

[50] Coppelman, *Extradition and Rendition: History-Law-Recommendations,* 14 Boston L.R. 591, 614 (1934).

[51] 18 U.S.C. 3191 provides for compulsory process to secure the attendance at extradition hearings of witnesses on behalf of indigent fugitives. However, the statute applies only to witnesses who are resident in the United States. *Merino* v. *United States Marshal,* 326 F.2d 5, 11 (9th Cir. 1964), *cert. denied,* 377 U.S. 997 (1964).

[52] *Matter of Sindona,* 450 F. Supp. 672 (S.D. N.Y. 1978); *Shapiro* v. *Ferrandina, supra* note 47; *Freedman* v. *United States, supra* note 37; *Sayne* v. *Shipley, supra* note 44; *First National City Bank* v. *Aristequieta,* 287 F.2d 219, 226 (2d Cir. 1960); *Desmond* v. *Eggers,* 18 F.2d 503, 505–506 (9th Cir. 1927); *Collins* v. *Loisel, supra* note 46; *Charlton* v. *Kelley,* 229 U.S. 447, 458 (1913).

[53] See, generally, 6 Whiteman, *supra* note 3, at 859–865; Note, *Statute of Limitations in International Extradition,* 48 Yale L.J. 701 (1939).

[54] See, e.g., *Galanis* v. *Pallanck,* 568 F.2d 234 (2d Cir. 1978).

Virtually every extradition treaty contains a provision barring extradition for a political offense, and many treaties also preclude extradition if the requesting country has political motives for seeking the return of the fugitive. Under the present case law, the courts decide whether the crime for which extradition has been requested is a political offense[55] but traditionally have declined to consider whether the requesting country's motives in seeking extradition are political.[56] Since these issues are usually intertwined,[57] the possibility for inconsistent results is obvious.

If the judicial officer is persuaded that the crime charged falls within the treaty, that the acts involved would constitute an offense in this country, that the evidence submitted is sufficient to sustain the charge under the treaty, and that no legal defense to extradition is applicable, it is his duty to certify these conclusions to the Secretary of State. The judicial officer also must send the Secretary of State a copy of all the oral testimony taken at the hearing. 18 U.S.C. 3184 requires the judicial officers to order the commitment of the accused to jail pending surrender, and there is no provision for release on bail at this stage of the proceedings. If the judicial officer finds that the fugitive is not extraditable, the proceedings are terminated, and the fugitive is released from custody.

2. Provisions of the bill, as reported

Section 3194(a) requires that a judicial hearing be held to determine whether the person sought is extraditable (unless such a hearing has been waived under section 3193) and sets out the procedure for the hearing. It provides that the purpose of the hearing is limited to the findings under section 3194(d) and the political offense determination under section 3194(e). The court does not have jurisdiction to determine the merits of the charge against the person sought or to determine whether the foreign state is seeking the extradition of the person for the purpose of prosecuting or punishing the person for his political opinions. The hearing must be held as soon as practicable after the arrest of the person or issuance of a summons.

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[55] *In re Ezeta et al.*, 62 Fed. 972 (N.D. Cal. 1894). Basically, under current case law, some courts have said that there are "pure" political offenses, such as treason or sedition, and "relative" political offenses, such as one "committed in the course of furthering civil war, insurrection or political commotion." *Id.; Karadzole* v. *Artukovic*, 242 F.2d 198 (9th Cir. 1957), rev'd on other grounds, 344 U.S. 393 (1957); *United States ex rel. Karadzole* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959); *Ramos* v. *Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); see Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 Columbia Journal of Transnational Law 381 (1980). Three recent extradition cases graphically illustrate potential problems with the "political offense" exception with respect to international terrorism. *In the Matter of the Extradition of Peter Gabriel John McMullen*, the person sought was charged with the bombing of a British army installation in England. See Magistrate Memorandum Decision No. 3-78-1899 MG (N.D. Cal. 1979), reproduced in Extradition Hearings, *supra* note 1 at 294-296. In the case of *In re Desmond Mackin*, Mackin was charged with an attempt to murder a British soldier dressed in civilian clothes in a Belfast bus station. See Magistrate Opinion No. 80 Cr. Misc. 1 (S.D. N.Y. 1981), reproduced in Extradition Hearings, *supra* note 1 at 140-240. In the third case, *Ziyad Abu Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 984 (1981), Abu Eain was charged with the bombing murder of several children in an Israeli resort town. In both the *McMullen* and *Mackin* cases the magistrates denied extradition on the ground that the offenses charged were "political offenses." In the *Abu Eain* case, the court of appeals held the political offense exception to extradition inapplicable.

[56] *In re Lincoln*, 228 Fed. 70 (E.D. N.Y. 1915). aff'd *per curium*, 241 U.S. 651 (1917); *In re Gonzalez*, 217 F.2d 717, 722 (S.D. N.Y. 1963); *Garcia-Guillerin* v. *United States*, 450 F.2d 1192 (5th Cir. 1971); *In re Locatelli*, 468 F. Supp. 568, 575 (S.D. N.Y. 1979); *Sindona* v. *Grant*, *supra* note 43.

[57] Compare *Ziyad Abu Eain* v. *Wilkes*, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981), with the Memorandum decision of the Secretary of State in the case of *Ziyad Abu Eain*, Extradition Hearings, *supra* note 1 at 133-139.

Subsection (b) supplements present law by expressly providing that the fugitive be informed of his right to be represented by counsel at the extradition hearing. Indigent fugitives will be provided with counsel pursuant to the provisions of section 3006A of title 18, relating to court-appointed counsel. The provision also requires that the fugitive be informed of his right to introduce evidence in his own behalf on matters within the jurisdiction of the court. The subsection thereby leaves intact the extensive case law on this point.[58]

Subsection (c) deals with evidence in an extradition hearing. Paragraph (1) is designed to clarify the circumstances under which documentary evidence will be admissible on behalf of either party in an extradition hearing.

Many treaties specifically set out the manner in which extradition documents must be authenticated,[59] and subparagraph (A) of paragraph (1) provides that documents so authenticated shall be admissible. It also provides that documents authenticated in accordance with the provisions of United States law shall be deemed admissible as evidence in the extradition hearing. Thus, documents which comply with the requirements of Article IX of the Federal Rules of Evidence would be admissible in extradition proceedings. However, the provision does not require the exclusion from the hearing of evidence which fails to satisfy the Federal Rules of Evidence. Rather, the subsection merely underscores the commonsense proposition that evidence which satisfies the high standards set out in the Rules, and which would be admissible in civil or criminal proceedings in this country, should likewise be acceptable in extradition proceedings.

Subparagraph (B) of paragraph (1) is based on 18 U.S.C. 3190 and provides that a document authenticated in accordance with the applicable laws of the foreign country requesting extradition shall be admissible if it is accompanied by an attestation to this effect from a judge, magistrate, or other appropriate officer of the foreign state. The phrase "other appropriate officer" would include an official of the foreign counterpart of the Department of Justice, or any other government official likely to be familiar with legal matters in the foreign country. It further requires that the signature and position of the person so attesting be certified by a diplomatic or consular officer of the United States posted in the foreign country, or by a diplomatic or consular officer of the foreign state assigned to this country.[60] The provision thus brings the essential requirements of 18 U.S.C. 3190 more into line with Rule 902(3) of the Federal Rules of Evidence.

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[58] See *supra* note 52, and accompanying text.

[59] See e.g., Art. 10(6). Extradition Treaty, United States-Mexico, signed May 4, 1978. — U.S.T.—, T.I.A.A. 9656 (entered into force January 25, 1980). The United States will also be a party to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, done at The Hague, October 26, 1960, 527 U.N.T.S. 189 (ratified by the Senate Nov. 28, 1979). This Convention will eliminate a substantial portion of the authentication requirement with respect to extradition documents submitted by one signatory country to another.

[60] It is anticipated that in most cases the foreign state's diplomatic or consular personnel assigned to the United States will make the certification required by the section, thereby relieving U.S. diplomatic and consular officers abroad of this chore.

Subparagraph (C) of paragraph (1) permits the court handling an extradition matter to accept as evidence any documents which it is persuaded are in fact authentic, regardless of compliance with either of the two previous provisions. This rule is similar to Rule 901(a) of the Federal Rules of Evidence, and is in accord with established case law permitting the authenticity of documents presented in extradition proceedings to be established by the testimony from expert witnesses or by other evidence.[61]

Paragraph (2) of subsection (c) provides that a certificate or affidavit by an appropriate State Department official as to the existence or interpretation of a treaty is admissible as evidence of that treaty or its interpretation.

The overwhelming majority of extradition treaties require that the requesting country present such evidence of criminality as would justify commitment for trial had the crime or offense been committed in the place where the fugitive has been found. Under paragraph (2) such a treaty provision may be satisfied by evidence establishing probable cause to believe that a crime was committed and that the person sought committed it. This is the usual standard under Rule 5.1 of the Federal Rules of Criminal Procedure for commitment for trial in Federal criminal cases. This approach permits the Federal courts to apply the standard for commitment with which they are most familiar, and establishes a single, uniform standard by which the sufficiency of evidence in extradition proceedings may be measured. It is also consistent with the views expressed in several recent court decisions pointing out the advantages of dealing with the quantum of evidence for extradition in a manner consistent with Federal law.[62]

Paragraphs (1), (2), and (3) of subsection (d) carry forward the requirements of 18 U.S.C. 3184 that instruct the court to find the fugitive extraditable if the evidence presented is sufficient to sustain the complaint under the provisions of the applicable treaty, and also requires that the court find probable cause that the person before it is the person sought in the foreign state, and that none of the defenses to extradition which the court is empowered to consider are applicable. Paragaph (4) bars extradition unless the acts for which the fugitive's surrender is requested would constitute a crime punishable under State or Federal law in the United States. Finally, the subsection states that the findings required for extradition may be established by hearsay evidence or certified documents alone. This rule is similar to Rule 5.1 of the Federal Rules of Criminal Procedure, which permits a finding of probable cause to commit for trial to be based on hearsay evidence. It is also in accord with recent court decisions which point out that the kind of evidence necessary for extradition is an issue which should be determined by uniform national law.[63]

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[61] See, generally, *United States* v. *Galanis,* 429 F. Supp. 1215 (D. Conn. 1977), re'vd on other grounds, 568 F.2d 234 (2d Cir. 1978).

[62] *Greci* v. *Birkness, supra* note 41; *Brauch* v. *Raiche, supra* note 39.

[63] *U.S. ex rel. Sakaguchi* v. *Kaulukukui,* 520 F.2d 726, 728 (9th Cir. 1975); *Shapiro* v. *Ferrandina, supra* note 47.

Section 3194(e) provides that the court shall not find a person extraditable if the person establishes by clear and convincing evidence that the offense for which he is sought is a political offense or an offense of a political nature. This subsection, however, places severe limits on the scope of the terms "political offense" and "offense of a political character." Paragraph (e)(1) states unequivocally that the following offenses per se do not fall within the concept of a "political offense": (1) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970; (2) an offense within the scope of the Convention for the Suppression of Unlawful Act Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971; (3) a serious offense involving an attack against the life, physical integrity, or liberty of an internationally protected person, including a diplomatic agent; (4) an offense with respect to which a multilateral treaty obligates the United States to either extradite or submit for the purposes of prosecution a person accused of the offense; (5) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs; (6) an offense that consists of rape; and (7) an attempt or conspiracy to commit one of the listed offenses or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

Paragraph (e)(2) further narrows the scope of "political offense" by providing that, except in extraordinary circumstances, other serious crimes against the person and the use of firearms and explosives in a manner dangerous to other persons are not political offenses.

Subsection (e) derives from section 3194 (e) and (f) as added to S. 1940 by the Senate Committee on Foreign Relations and as passed by the Senate last Congress as a substitute for the approach adopted by the Committee on the Judiciary.[64]

The Foreign Relations Committee explained the basis for the changes as follows: [65]

> The Committee on Foreign Relations proposes * * * to permit the appropriate courts to make findings concerning the application of the political offense exception. While it can be argued that the Secretary of State is generally better able than the courts to assess the circumstances justifying a political offense exception, the Committee favors the retention of some role for the judicial process. Most countries with whom the U.S. has extradition agreements permit the courts to make such determinations. Moreover, American courts have reviewed political offense questions for nearly one hundred years. Preserving limited court jurisdiction to interpret the exception pursuant to legislative guidelines would continue this well-established tradition. It would also provide a check against an executive authori-

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[64] See, S. Rept. No. 97-475, *supra* note 1 at 4-5. The Judiciary Committee adopted similar limitations on the scope of the "political offense" concept (see S. 1940, as reported, section 3196(a)); however, the Judiciary Committee lodged the decision on this issue with the Secretary of State, subject to judicial review on the administrative record in the United States Courts of Appeals (*Ibid.*; see S. Rept. No. 97-331, *supra* note 1 at 14-15, 20-22).

[65] S. Rept. No. 97-475, *supra* note 1 at 7-9.

ty that could, depending upon the political sensitivities involved in a given case, result in inconsistent and unsound application of the political offense exception.

However, while the Committee on Foreign Relations has concluded that the courts should retain some jurisdiction over political offense cases, it is also very clear that in order to effect more consistent application of the exception, the courts must be given clearer guidelines with respect to certain classes of behavior that should never be considered political offense and others which should only be considered political offenses in extraordinary circumstances.

* * * * *

The Committee on Foreign Relations has proposed its amendments * * * based on the belief that it is inappropriate to apply the political offense exception to conduct that the international community has taken formal steps to prohibit and punish. Drawing on this standard, the Committee has concluded that the political offense exception should not be considered by the court when to apply it would have the effect of protecting behavior that is specifically outlawed internationally. Included in this category would be offenses within the scope of either the Hague Convention on Seizure of Aircraft; the Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the Convention on the Physical Protection of Nuclear Materials; the International Convention Against the Taking of Hostages; the Convention on the Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; other multilateral treaties obligating the U.S. to either extradite or prosecute persons whose offenses are contemplated by the applicable treaty; and the manufacture, sale, or distribution of narcotics. The proposed amendment * * * establishes an absolute prohibition against the courts considering such acts to be political offenses. The intended effect of this prohibition is to deter international terrorists and other criminals from using the United States as a safehaven from prosecution for crimes they claim to be political but whose characteristics violate overriding international legal standards. * * * [The Committee] believes that a different standard should apply to those offenses involving the use of firearms or explosives, or other behavior involving the use of force or violence. * * * In such cases, extraordinary circumstances must be demonstrated by the person resisting extradition in order for the appropriate court to find that a political offense has been committed. This standard allows for the political offense exception to be applied potentially in that very narrow class of cases where an otherwise common crime may be transformed by the political context in which it is committed.

The Committee intends that the burden of the person resisting extradition in demonstrating such extraordinary

> circumstances should be a considerable one. While current case law may provide useful guidance it is not intended, for example, that the mere existence of a rebellion, civil war, riot or other disturbance, during which the offense in question is committed, should result in a finding that the offense itself is political in nature. Nor should it be sufficient simply to show that the motivation of the individual committing the act—however sincere or noble—was related to a political objective. It should not be the policy of the United States to encourage or condone violent or other criminal behavior simply because it is the view of the persons committing such acts that they are somehow connected with a political activity or have an obstensible political purpose or justification. However, it should also not be the policy of the United States to render up automatically to foreign authorities an individual who, in the course of seeking to excerise legitimate civil or political rights in a non-violent manner, is placed in such a position that he has no reasonable choice except to commit an otherwise criminal act. For the court to make such a determination the test should be focused upon the individual and whether the offense for which he is sought was a consequence of the violation of his internationally recognized civil or political rights by the state requesting extradition. Acts of indiscriminate or excessive violence or acts of deliberate brutality would presumably never fall within the exception.
>
> In short, while the occasions for recognizing the political offense exception will necessarily be few and far between, the Committee believes that it should continue to be within the authority of U.S. courts to determine that the exception should apply, subject to the procedural innovations and exclusions introduced in this legislation.
>
> The belief that such findings are expected to be rare is further reinforced by the amendment * * * providing that the person claiming application of the exception must establish by *clear and convincing* evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense. Shifting the burden of the proof to the person seeking application of the political offense exception reinforces the Committee's belief that its legitimate application should be infrequent and also in accords with the guidelines. * * *

These limitations on the scope of the political offense exception to extradition—regardless of whether the courts or the Secretary of State make the decision—arise out of a deep concern this Committee has for the potential crippling effect on United States efforts to combat international terrorism of recent judicial decisions by magistrates in the *McMullen* and *Mackin* cases that bar extradition for acts of terrorism which ostensibly are associated with political activity or protest. William Hannay, a legal expert on the political offense issue, aptly commented on the judicial line-drawing in the terrorist cases of *McMullen, Mackin,* and *Abu Eain:*[66]

> In each of these cases, the test set forth in the 19th century English case of *In re Castioni* * * * was accepted as the operative definition of a "relative" political offense. The court in *Castioni* stated that a political offense is a crime which was "incidental to and formed a part of political disturbance" * * * The absurdity and ultimate cruelty of applying this test or any other "test" of a political offense is illustrated by the assertion of the magistrate in *McMullen* who taking the exception to its insane but logical end, stated: "[e]ven though the offense be deplorable and heinous, the criminal action will be excluded from deportation if the crime is committed under these pre-requisites." * * * Mechanically applying the *Castioni* test, the magistrates in *Mackin* and *McMullen* concluded that extradition was prohibited since "political disturbances" were taking place in Northern Ireland and the attempts by *Mackin* and *McMullen* to kill British soldiers were natural incidents of these disturbances.
>
> [With respect to the Seventh Circuit decision in *Abu Eain*] I find shocking the notion that the "political offense" exception is cut so far loose from any ethical mooring that Abu Eain's defense team could argue in apparent good faith that terror bombing of civilians is a legitimate technique in an "insurrection-liberation struggle," and that the political offense exception prevents extradition for such a crime. It was a sad spectacle to see a former Attorney General of the United States, representing Abu Eain, stand before the Seventh Circuit and utter that bankrupt shibboleth of moral relativism, "one man's terrorist is another man's freedom fighter." Second, the court's application of the [judicial test for a political offense] in *Abu Eain* was ultimately just as mechanical as that in *Mackin* and *McMullen* and left the unmistakable impression that the court would have denied extradition if Abu Eain had directed his attacks at Israeli military or governmental officials. * * * We should, I suppose, feel some relief that the Seventh Circuit recognized that the killing of children on the streets of a resort town did not constitute a "political offense."

The Committee has deliberately refrained from attempting to define the phrase "extraordinary circumstances." It does consider, however, that this standard marks a clean break with such cases as *McMullen* and *Mackin.* Modern concepts, such as the Swiss rule of predominance and proportionality, are relevant and should be considered.[67]

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[66] Extradition Hearings, *supra* note 1 at 14. As noted *supra* note 55, the *McMullen* case involved the bombing of a British army installation in England; the *Mackin* case involved an attempt to murder a British soldier dressed in civilian clothes in a Belfast bus station; and the *Abu Eain* case involved the bombing murder of several children in an Israeli resort town.

Hannay has raised the issue factually but has not speculated on the line the Seventh Circuit would draw with respect to the bombing assassination of Lord Louis Mountbatten that incidentally killed his grandson, a local youth, and the mother-in-law of his daughter. See, Hannay, *International Terrorism and the Political Offense Exception to Extradition, supra* note 55 at 382.

There are, of course, some clear cases. Certainly this Committee concurs with the Foreign Relations Committee that acts of indiscriminate violence or deliberate brutality would never fall within the exception. On the other hand, conduct recognized as legitimate by international standards would constitute an "extraordinary circumstance." For example, conduct otherwise a crime would meet this criteria if it arose out of, and was incident to, an "armed conflict" of the type regulated by the 1949 Geneva Convention and the 1907 Hague Rules, unless the conduct constituted a war crime or a crime against peace and humanity.[68] Presumably, this would include the Afghan guerrillas within the political offense exception, but exclude the IRA, PLO, and Red Brigade.

Finally, the Committee believes that the courts should resolve doubts in a particularly hard case involving political violence in favor of approving extradition at the judicial level, thereby leaving appropriate disposition to be made under the political asylum provisions of the law.

Subsection (e) also provides that the court not take evidence with respect to, or otherwise consider, a political offense claim until the court determines the person is otherwise extraditable. This obviates the necessity of making a sensitive, on the record, inquiry into the affairs of the requesting state if, for some other reason, the person is not extraditable. If the issue is to be determined, either party may move to have a Federal judge, rather than a magistrate, decide it.

Subsection (f) details the procedures that the court must follow at the conclusion of the hearing. If the court finds that the fugitive is extraditable, it must state, in writing, its findings and rationale with respect to each of the offenses for which extradition is sought.[69] These findings must be sent to the Secretary of State, together with a transcript of the hearing.[70] If the court finds that the fugitive is not extraditable, the findings required by the subsection may be accompanied by a report rather than a transcript of the hearing.

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[67] Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 Cornell Int'l L.J. 71, 82–83 (1978), and cases cited therein.

[68] With respect to politically motivated violence by individuals not crossing the threshold of "armed conflict," it is difficult to imagine any circumstance in which homicide, aggravated assault, rape, kidnaping, or hostage-taking would be deemed an acceptable "political" act. Terrorist bombings, assassinations, "knee-capping", and other similar violent acts with a political purpose—particularly where democratic institutions are in place—lack legitimacy. Certainly, they cannot meet the Swiss rule of predominance. See Hannay, *International Terrorism and the Political Offense Exception to Extradition*, *supra* note 55. See also, American Bar Association, Report No. 104A, approved by the House of Delegates in August 1983, in which the Association "strongly" recommend that legislation "preclude the application of the political offense exception from offenses which constitute serious breaches of the norms established under international humanitarian law applicable in international and non-international armed conflicts, without subjecting to extradition combatants for warlike acts which do not transgress those norms * * *"

[69] This requirement is consistent with the practice followed by the courts today. See *Kaplan* v. *Vokes*, 649 F.2d 1336 (9th Cir. 1981); *Shapiro* v. *Ferrandina*, *supra* note 47.

[70] Present law (18 U.S.C. 3184) only requires that the court send the Secretary a transcript of the *testimony* taken at the hearing. By providing the executive branch with a fuller record of the proceedings the Secretary of State will be more fully informed in making his decision on extradition.

SECTION 3195. APPEAL

1. Present Federal law

Under present Federal law, there is no direct appeal from a judicial officer's finding in an extradition hearing.[71] A person found extraditable may only seek collateral review of the finding, usually through an application for a writ of habeas corpus.[72] The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition.[73] The lack of direct appeal in extradition matters adds undesirable delay, expense, and complication to a process which should be simple and expeditious.

2. Provisions of the bill, as reported

Section 3195 of the proposed chapter permits either party in an extradition case to appeal directly to the appropriate United States court of appeals from a judge or magistrate's decision. It is anticipated that review on appeal will be very narrow and that any findings of fact by the lower court will be affirmed unless they are clearly erroneous.

Subsection (a) specifies that the appeal shall be filed within the time limits set out in Rules 3 and 4(b) of the Federal Rules of Appellate Procedure, i.e., 10 days for the person sought and 30 days for the government. These are the same deadlines for filing a notice of appeal in criminal cases, and while an extradition hearing is not a trial,[74] or even strictly a criminal proceeding,[75] these deadlines adequately balance the competing interests of fairness and expedition. It is anticipated that other aspects of the appeal process (such as the preparation and submission of the record, briefing, argument and decision) will be governed by the applicable provisions of the Federal Rules of Appellate Procedure.

If the fugitive has been found extraditable, subsection (a) requires that surrender to the foreign government be stayed pending determination of the appeal by the court of appeals.[76] This provision prevents the government from mooting the appeal by spiriting the petitioner out of the country while the matter is *sub judice*. The provision is designed to maintain the *status quo* with respect to the fugitive's custody pending appeal. It is anticipated that the district court will not ordinarily stay or delay any other element of the extradition process, such as the certification of its findings to the Secretary of State under section 3194(e).

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[71] *Collins* v. *Miller*, 252 U.S. 364, 369 (1920).

[72] See, e.g., *Sindona* v. *Grant*, *supra* note 43.

[73] *Hooker* v. *Klein*, 573 F.2d 1360 (9th Cir. 1978); *United States* v. *Mackin*, *supra* note 2.

[74] *Gluckaman* v. *Henkel*, 221 U.S. 508, 512 (1911).

[75] *United States ex rel. Oppenheim* v. *Hecht*, 16 F.2d 955, 956 (2nd Cir. 1927); *United States ex rel. Kelin* v. *Mulligant*, 1 F. Supp. 635, 636 (S.D. N.Y. 1922).

[76] The automatic stay of extradition expires when the court of appeals issues its mandate in the matter. Thus, the automatic stay would not ordinarily protect a fugitive seeking further discretionary review, such as an applicant for a writ of *certiorari* from the Supreme Court. Of course, the fugitive whose case merits further review is free to request that either the court of appeals or the Supreme Court exercise its discretion by staying surrender while *certiorari* or other relief is considered.

Subsection (b) provides that a person found extraditable must remain in official detention pending the appeal unless the court of appeals finds that special circumstances require release. This is a slight amelioration of present law, which does not permit the release of a fugitive on bail after he has been found extraditable.[77] The change is desirable because the same kind of pressing, unusual situation which might require that the person sought be released from custody on bail pending the extradition hearing[78] could conceivably arise after the extradition hearing. However, it is anticipated that this authority to release a fugitive on bail will be utilized even more sparingly than the power to grant bail before the extradition hearing, and only after the most thorough and searching examination of the claimed need for release. It is expected that the courts of appeal will keep in mind that "no amount of money could answer the damage that would be sustained by the United States if [the fugitive] were to be released on bond, flee the jurisdiction, and be unavailable to surrender. * * * "[79]

If the person was found not extraditable, subsection (b)(2) permits the district court to order that the person be released pending an appeal by the government. Release shall be ordered unless the district court is satisfied that the appellee is likely to flee before the appeal is decided, or endanger the safety of any other person or the community.

A major purpose of section 3195 is to simplify, and thereby expedite, the extradition process by providing for a direct appeal from a contested decision on extradition. The direct appeal provided by this section largely eliminates the present need for habeas corpus proceedings in order to obtain judicial review of the initial finding that a person is extraditable. This purpose would be frustrated if a fugitive bent on dilatory tactics were permitted to pursue an appeal under this section, a petition for *certiorari* to the Supreme Court, and then begin one or more rounds of habeas corpus proceedings. Such a course of action would lengthen the extradition process rather than shorten it. Therefore, subsection (c) deprives any court of jurisdiction to review a finding that a fugitive is extraditable under this chapter unless the fugitive has exhausted the appellate remedies available to him by right in this section. It also forecloses an appeal, a petition for habeas corpus, or declaratory judgment action if the validity of the fugitive's commitment for extradition has been ruled upon in prior proceedings unless grounds are offered which could not have been presented previously.

The resolution of challenges to judicial action in international extradition cases should be especially prompt. Extradition cases are quasi-criminal in nature. Moreover, in such cases, our government's willingness to make a timely and ungrudging execution of its solemn treaty obligations to a friendly nation is in question.[80] Therefore, this section requires that courts of appeals decide cases arising under this chapter expeditiously.

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[77] In fact, 18 U.S.C. 3184 specifically provides that a person found extraditable must be committed "to the proper jail there to remain until * * * surrender shall be made".

[78] See *supra* notes 23 and 24, and accompanying test.

[79] *Jimenez* v. *Aristequieta*, 314 F.2d 649 (5th Cir. 1963).

[80] *Magisano* v. *Locke*, 545 F. 2d 1228, 1230 (9th Cir. 1976).

SECTION 3196. SURRENDER OF A PERSON TO A FOREIGN STATE

1. Present Federal law

Under 18 U.S.C. 3186, the Secretary of State may order that any person found extraditable by a court under 18 U.S.C. 3184 be delivered to an authorized agent of the government seeking extradition. Although it is generally agreed that the Secretary's decision in this matter is discretionary,[81] present law provides no indication of the parameters of the Secretary's discretion.

18 U.S.C. 3188 states that if a fugitive found extraditable under 18 U.S.C. 3184 is not removed from the United States within "two calendar months" of the court's commitment order, he may be released from custody unless there is "sufficient cause" why release should not be ordered.[82] The courts have held that if the fugitive institutes litigation challenging this extradition, the two-month period commences when the claims are finally adjudicated rather than when the commitment was issued.[83]

2. Provisions of the bill, as reported

Subsection (a) carries forward the essence of 18 U.S.C. 3186 by providing that the Secretary of State shall make the final decision as to extradition. The subsection requires that the Secretary's decision be made in accordance with the chapter and the applicable treaty, and lists the actions that the Secretary may take.

Subsection (a)(1) simply permits the Secretary to order the surrender of a person the court has found to be extraditable to a duly appointed agent of the foreign state.

Subsection (a)(2) permits the Secretary to condition the surrender of a fugitive upon the acceptance by the foreign state of restrictions or conditions he considers necessary in the interest of justice or to effectuate the purposes of the treaty. This provision underscores the Department of State's authority to impose such restrictions where humanitarian concerns[84] or questions concerning trial procedures in the requesting state exist.[85] It would also permit the imposition of restrictions expressly contemplated in the provisions of some newer treaties.[86]

Subsection (a)(3) of section 3196 provides that the Secretary of State may decline to order the surrender of the person if the Secretary determines that the foreign state is seeking extradition for the purpose of prosecuting or punishing the person because of his political opinions, race, religion, or nationality. It also permits the Secretary to decline extradition where return of the person would be incompatible with humanitarian considerations, such as the age or infirmity of the person being sought or the proportionality of the punishment in relation to the crime that may have been committed. This authority would, when applicable, follow the rule of non-inquiry whereby the courts refrain from making findings on issues largely concerned with the internal political or social circumstances in a foreign state. The Secretary of State, however, is considered uniquely qualified to make such inquiries as this practice is already a significant aspect of his foreign policymaking responsibilities. These procedures should, in most cases, provide the preferred basis for appropriate relief from extradition on grounds consistent with the traditions, heritage, and foreign policy principles of this country.

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[81] See, generally, Note, *Executive Discretion in Extradition*, 62 Columbia Law Review 1313 (1962).

[82] *In re Factors' Extradition*, 755 F. 2d 10 (7th Cir. 1934); *In re Normano*, 7 F. Supp. 329 (D. Mass. 1934); 6 Whiteman, *supra* note 3, at 1064–69.

[83] *Jimenez* v. *United States District Court for the Southern District of Florida*, 84 S. Ct. 14, 11 L. Ed. 2nd 30 (1963); *Barrett v. United States*, 590 F. 2d 624 (6th Cir. 1978).

[84] See, e.g., *Peroff* v. *Hylton*, 542 F. 2d 1247, 1249 (4th Cir. 1976). *cert denied*, 429 U.S. 1062 (1977); *Sindona* v. *Grant, supra* note 43 at 207; see Note, Columbia Law Review, *supra* note 81.

[85] For example, the Department of State has frequently conditioned surrender of a fugitive convicted in absentia upon a promise by the foreign country involved to permit a retrial. See 6 Whiteman, *supra*, note 3, at 1051, 1117–1122.

[86] For example, some treaties permit the requested state to condition extradition upon satisfactory assurances that the death penalty will not be imposed. See e.g., Art. 6, Extradition Treaty, Canada-United States, signed December 31, 1971, 27 U.S.T. 983, T.I.A.S. 8237 (entered into force March 27, 1976).

With respect to decisions under subsection (a)(3), the Secretary is required to consult with the appropriate Offices and Bureaus of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs. Requiring the Secretary to consult with that Bureau is intended to ensure that the Secretary is fully advised on the political and social conditions in the foreign state at issue. Presently, the Bureau of Human Rights and Humanitarian Affairs advises the Secretary of State and the Department of Justice on asylum issues. This provision is, therefore, in keeping with the Bureau's current role in such matters.

Subsection (a) also makes it explicit in the statute that the decisions of the Secretary of State under paragraphs (1), (2), and (3) of that subsection are in the nature of post-judicial "last-step" final administrative determinations prior to actually effecting the extradition and, as such, are not subject to judicial review. As noted, this codifies the rule of non-inquiry.

Finally, subsection (a) expressly authorizes surrender of United States nationals unless surrender is expressly prohibited by the applicable treaty.[87] This provision is necessary in light of the decision in the *Valentine* [88] case in which the Supreme Court held that language contained in many of the older extradition treaties to which the United States is a party does not permit the surrender of United States citizens absent explicit statutory authority for such surrender. The result of the *Valentine* decision has been to effectively immunize United States citizens from extradition in many cases—a result never intended by the negotiators of the treaties involved. It is the policy of the United States to treat its citizens and aliens within its borders equally in extradition matters,[89] and this subsection permits that policy to operate effectively.

Subsection (b) requires that the Secretary of State notify all interested parties of his decision on extradition.

Subsection (c)(1) provides that the fugitive shall be released from custody if the Secretary of State does not order, or declines to order, the person's surrender within forty-five days after receiving the record of proceedings from the court. Of course, if the Secretary of State decides within forty-five days to refuse to order extradition, the authority for holding the person sought in custody under section 3194(e)(1) immediately expires, and the person should be released from detention at once.

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[87] At present, no extradition treaty to which the United States is a party expressly prohibits surrender of citizens of the requested state.

[88] 299 U.S. 5 (1936), *supra* note 32.

[89] Many foreign countries do not extradite their citizens because those countries can instead prosecute and punish their citizens for crimes committed in another country. As a general rule, the United States has no such ability. *Escobedo and Castillo* v. *Forsch*, 623 F.2d 1098 (5th Cir. 1980); 6 Whiteman, *supra* note 3, at 876–878.

Subsection (c)(2) is based on the provisions of 18 U.S.C. 3188, and provides that when the Secretary of State has ordered a person extradited, the foreign country involved must take custody of the person and remove him from the United States within 30 days. This 30-day time period does not begin until all litigation challenging extradition has been completed. The subsection expressly excludes from consideration the time during which surrender has been stayed pending litigation.

Subsection (c) requires a person found extraditable to give the Secretary of State reasonable notice that he will seek release because of expiration of a time limitation set forth in subsection (c)(1) or (c)(2), and forbids release if good cause is shown for the delay in effecting surrender.

SECTION 3197. RECEIPT OF A PERSON FROM A FOREIGN STATE

1. Present Federal law

18 U.S.C. 3192 authorizes the President to "take all necessary measures for the transportation and safekeeping" of a person extradited to the United States from a foreign country. At one time the President relied upon this statute to issue a warrant designating an agent to receive custody of a fugitive from a foreign government. 18 U.S.C. 3193 authorizes such an agent to convey the fugitive directly to the place of trial, and grants to the agent "all the powers of a Marshal of the United States, in the several federal districts through which it may be necessary for him to pass with [the] prisoner * * * ". The authority to issue warrants and appoint agents under these sections has now been delegated to the Secretary of State.[90] However, the Department of State wishes to transfer to the Department of Justice the authority to appoint agents and issue warrants in these matters.

2. Provisions of the bill, as reported

Section 3197 of the proposed chapter carries forward the provisions of 18 U.S.C. 3192 and 3193, with minor modifications reflecting present United States practice.

Subsection (a) authorizes the Attorney General to designate an agent to receive custody of a fugitive surrendered by a foreign government, and permits the agent to convey the fugitive to the place of trial in the United States. The final sentence of the subsection permits the extradited fugitive to be taken directly to the Federal district or State jurisdiction in which charges are outstanding, without removal proceedings under Rule 40 of the Federal Rules of Criminal Procedure or interstate rendition proceedings.

Section 3197(b) is new, and is designed to implement provisions, found in some of the most recent United States extradition treaties. The laws in many foreign countries require that extradition be postponed until the person has satisfied any outstanding criminal charges in that country.[91] Frequently, a person sought by the United States has already been tried and convicted of other charges in the requested country and has a sentence to serve there. If the sentence abroad is a long one, the postponement of surrender could compromise the possibility of a speedy and fair trial in this country.[92] Some extradition treaties contain provisions which deal with this problem by permitting "temporary extradition". Under these treaty provisions, a fugitive convicted abroad would be surrendered to the United States solely for purpose of trial and sentencing here, then returned to the foreign country involved to finish the sentence previously imposed there.[93] This process balances our government's interest in adjudicating the charges while the evidence is fresh with the foreign country's desire to fully enforce its laws. It also works to a fugitive's benefit by enabling him to answer the charges in this country while evidence for his defense is still available, and by creating the possibility that the sentence imposed upon conviction in this country could run concurrently with that the fugitive must serve abroad.

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[90] Executive Order 11517, 35 Fed. Reg. 4937 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News, at 6232.

Section 3197(b) provides implementing legislation for treaty provisions of this type. It provides that when a foreign state has delivered a person to the United States on the condition that the person be returned at the conclusion of the criminal trial or sentencing, the Bureau of Prisons shall keep the person in custody until the judicial proceedings are concluded, and thereafter surrender the person to a duly appointed agent of the foreign country. It also provides that the return to the foreign state of the person is not subject to the requirements of the chapter, such as an extradition hearing or an order of surrender by the Secretary of State.

SECTION 3198. GENERAL PROVISIONS FOR CHAPTER 210

1. In general

This section contains the definitions and general provisions applicable to the extradition chapter.

2. Present Federal law

18 U.S.C. 3198 requires that the foreign government which sought extradition pay all costs and fees resulting from the request. The costs resulting from extradition requests here frequently are so small that it is uneconomical—and diplomatically embarrassing—to attempt to enforce this statute. Moreover, many of the extradition treaties to which the United States is a party contain pro-

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[91] See, e.g., Extradition Act, R.S.C. 1952, c. 322 (Canada); s. 24, Ley de Extradicion (Dec. 29, 1975), Art. 11 (Mexico).

[92] *United States v. Rowbotham,* 430 F. Supp. 1254 (D. Mass. 1977); *United States* v. *Dolack,* 484 F.2d 527 (7th Cir. 1973). It is well to remember that both the prosecution and the defense suffer when a criminal trial is delayed too long. Indeed, as the Court of Appeals trenchantly remarked in *United States* v. *Judice,* 457 F.2d 418, 418 (5th Cir. 1972); " * * * all practiced trial lawyers are well aware that attrition from * * * delay is more damaging to the prosecutor's case than to that of the defense. This will be so as long as the prosecution has the burden of proof."

[93] Cf. 6 Whiteman, *supra* note 3, at 1052-1053.

visions which modify this statutory rule.[94] Also, the United States has entered into informal arrangements with some countries whereby each country bears most of the cost of the other's extradition request. In short, the present statute does not adequately reflect government policy in extradition matters.

Present statutory law offers no guidance as to who must pay the costs associated with United States requests to foreign countries for the extradition of fugitives. The Department of State requests extradition on behalf of either the State within the United States in which the fugitive is charged, or, if Federal charges are involved, on behalf of the United States. Therefore, the long-standing policy of the Department of State has been that the State jurisdiction which sought the fugitive's return must pay any expenses incurred in connection with the extradition request, and the Department of Justice must pay the expenses incurred in obtaining the extradition of a fugitive Federal offender.

3. Provisions of the bill, as reported

Subsection (a) of section 3198 sets forth definitions for the terms "court," "foreign state," "treaty," and "warrant."

Subsection (b) states that in general a foreign state which has requested the extradition of a fugitive located in the United States must bear all costs and expenses incurred in connection with that request. Since many of the extradition treaties contain provisions specifically dealing with costs in extradition matters, the subsection authorizes the Secretary of State to direct that this matter be handled in accordance with terms of the applicable treaty or agreement. Subsection (b) also requires that all costs and expenses incurred in connection with the execution of a request by a State of the United States for the return of a fugitive located in another country must be paid by that State. When the request for extradition is made to secure the return of a fugitive wanted for a Federal offense, the expenses must be borne by the United States. It is anticipated that when the fugitive involved is sought for both Federal and State offenses, the costs incurred abroad will be allocated accordingly.

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[94] For example, Art. 21, Extradition Treaty, United States-Mexico, signed May 4, 1978,—U.S.T.—T.I.A.S. 9656 (entered into force January 25, 1980) requires that the requested state bear all of the expenses of extradition except those incurred for the translation of the documents or the transportation of the fugitive. Extradition treaties are considered self-executing, Bassiouni, International Extradition and World Public Order 30–31 (1976), and supercede the provisions of prior inconsistent Federal legislation, Restatement (Second) of Foreign Relations Law of the United States. § 141. Comment (b) at 433 (1965). Therefore, whether 18 U.S.C. 3195 or a differing treaty provision is applicable in a particular extradition case depends on when the treaty entered into force.

PART N—ARSON AMENDMENTS

1. In general and present Federal law

Part N of title X makes technical amendments to subsections (d), (f), and (i) of 18 U.S.C. 844. Subsection (d) prohibits the transportation or receipt, or attempted transportation or receipt, of any explosive in interstate commerce with the knowledge or intent that it will be used to kill, injure, or intimidate another individual or damage property. Subsection (f) proscribes the malicious damage or attempt to damage by means of fire or an explosive, any property owned, possessed or used by the United States, or by any institution or organization receiving Federal financial assistance. Subsection (i) prohibits the malicious damage or attempted damage by means of fire or explosive of any building or other real or personal property used in or affecting interstate or foreign commerce. Subsections (f) and (i) were amended in the last Congress by the insertion of the word "fire" in the phrase "by means of fire or an explosive" to ensure that these sections could be used in all arson cases, especially those arsons caused by gasoline.[1]

All of these subsections contain enhanced penalty provisions that apply if personal injury[2] or death[3] results that represent a substantial increase over the ten years of imprisonment and $10,000 fine authorized as the maximum punishment for their violation if no injury or death results. On their face, these enhanced penalty provisions would appear to apply to the death or injury of a fireman or police officer who responded to an arson or other offense committed in violation of subsection (d), (f), or (i). However, a Federal district court has recently held that the enhanced penalty provisions did not apply to injuries to or deaths of firefighters that occurred while fighting an arson fire set in violation of subsection 844(i).[4]

Part N is designed to clarify congressional intent in this regard to ensure that the enhanced punishment provisions of subsections (d), (f), and (i) apply if personal injury or death results to any person including a fireman, policeman or other public safety officer, because of a violation.

2. Provisions of the bill, as reported

Part N of title X amends subsections (d), (f), and (i) of section 844 of title 18 by deleting the phrase "personal injury results" in each one and substituting the phrase "personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection." It also amends the three subsections by deleting the present phrase "death results" in each one and substituting the phrase, "death results to any person, including any public safety officer performing duties as a direct proximate result of conduct prohibited by this subsection."

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[1] Public Law 97-298. See 1982 U.S. Code Cong. and Adm. News, p. 2631.

[2] The penalty if personal injury results is up to twenty years imprisonment and a $20,000 fine.

[3] The penalty if death results is a fine of up to $20,000 and imprisonment for any term of years up to life.

[4] See the statement of Senator Grassley on introduction of S. 1716, a bill substantively identical to Part N, 129 Cong. Rec., S. 11275 (August 1, 1983 (daily ed.)).

As discussed, the purpose of these amendments is to make clear the congressional intent that any person who violates one of the subsections in a manner that results in a public safety officer's injury or death is subject to the enhanced punishments provided in the subsections. The Committee intends that the term "public safety officer" include such persons as firemen and policemen (and their equivalent of sheriffs and deputies), as well as ambulance drivers and laboratory technicians employed in a "civilian" capacity by a police or fire department. Also included would be employees of a State or municipal fire marshal's office or comparable organization charged with investigating fires or explosions.

The Committee intends that a death or injury is a direct or proximate result of conduct proscribed in subsection 844 (d), (f), or (i) if it is reasonably foreseeable. For example, included in the reasonably foreseeable consequences of the burning or destruction by an explosive of a building affecting interstate commerce in violation of subsection 844(i) would be a response by firemen and others (including high speed driving of fire equipment and ambulances), crowd control by policemen, and the examination of the remains of the building and undetonated explosives by any one of a number of law enforcement officers and technicians. Included in the reasonably foreseeable consequences of transporting or receiving an explosive in interstate commerce in violation of subsection 844(d) would be the interception or discovery of the explosive by law enforcement officers, and its subsequent examination, no matter how cleverly the explosive was concealed.

PART O—PHARMACY ROBBERY AND BURGLARIES

1. In general and present Federal law

Part O of title X adds a new provision to Federal law to proscribe the robbery and burglary of a pharmacy in which a controlled substance is taken. A similar provision limited only to robbery of a pharmacy involving a controlled substance was included in S. 2572 which passed the Senate in the 97th Congress. Part O is also similar to S. 721 introduced by Senator Grassley in the present Congress, but that bill also was limited to pharmacy robberies. The Committee is aware of the fact that thefts from manufacturers and distributors of controlled drugs by means of burglary has increased rapidly in recent years and hence determined that Part O should cover both robberies and burglaries directed at a pharmacy or at any manufacturer or distributor of controlled substances.

In the Committee's view, the existing pervasive Federal regulation of controlled substances and of the persons registered with the Drug Enforcement Administration to manufacture, distribute, and dispense these substances,[1] coupled with the serious danger from robbery and burglary faced by these registrants,[2] justify a new Federal statute to supplement State efforts to combat these crimes and allow Federal prosecution in certain cases. However, the Committee recognizes that robbery and burglary are traditionally matters of State concern and that many local police departments and prosecutors are fully capable of responding to these crimes when directed at pharmacies and other DEA registrants. As in the case with murder-for-hire [3] the Committee anticipates and intends that local authorities will continue to play a major role in or handle exclusively most such cases and that Federal authorities will intervene only where such aid is needed, for example in the case of an interstate ring of robbers or burglars or where involvement of organized criminal elements is suspected. The Committee expects that State and Federal officials will enter into working arrangements through the Justice Department's Law Enforcement Coordinating Committees or through some other localized process concerning the types of cases each will handle.[4]

2. Provisions of the bill, as reported

Part O of title X first sets out findings (section 1019) and a statement of purpose (section 1020). Section 1021 then amends Part D of the Control Substances Act (21 U.S.C. 841-852) by adding a new section 413 proscribing robbery and burglary of a pharmacy or of a person registered under section 202 of the Act (21 U.S.C. 822) as a manufacturer, distributor, or dispenser.

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[1] See Title 21, U.S.C. 801 *et seq.*

[2] During calendar year 1982, the Drug Enforcement Administration received reports of 1037 robberies of controlled substances from registrants. These crimes resulted in a diversion of about three million dosage units.

[3] See the discussion of Part A of this title.

[4] The necessarily limited Federal role, which will in most situations be directed at cases involving organized or sophisticated crime activity, diversions to facilitate major drug trafficking or other aggravating factors, is indicated by the fact that for every FBI and DEA agent, there are approximately 44 State and local law enforcement officers.

Subsection 413(a)(1) proscribes the taking by force and violence or by intimidation, from the person or presence of another, of any material, compound, mixture or prescription containing a controlled substance, belonging to, or in the care, control, custody, management or possession of any pharmacy or of a person required to register with the DEA under 21 U.S.C. 822. Attempted robberies are also covered.

Subsection 413(a)(2) proscribes entering the premises of a pharmacy or of a person registered with the DEA under 21 U.S.C. 822 with intent to steal [5] any material, compound, mixture or prescription containing any controlled substance. Attempted burglaries are also covered. Although intended primarily to cover burglaries of business premises, the subsection is also designed to cover the burglary of a residence of a DEA registrant if carried out with the intent to take controlled substances thought to be therein.

The penalty for pharmacy or registrant burglary in violation of section 413(a) is a fine of up to $5,000 and imprisonment for up to five years. In recognition of the fact that robbery often presents a more direct threat to human safety and life, the penalty for pharmacy or registrant robbery in violation of section 413(a)(1) is a fine of up to $5,000 and at least five years in prison. Subsection 413(a)(1) also provides that the punishment for a violation of subsection (a) (either the robbery or burglary provisions) after a previous conviction under either section 413, or under section 406 (21 U.S.C. 846) for a conspiracy to violate section 413, shall extend to a fine of up to $10,000 and imprisonment for at least ten years. Thus, a person convicted of a second pharmacy or registrant burglary (or pharmacy or registrant burglary following a previous conviction of pharmacy or registrant robbery) would be subject to the ten year minimum mandatory sentence.

Subsection 413(b) provides for increased punishment for whoever commits or attempts pharmacy or registrant robbery or burglary in violation of subsection (a) and in the course of the offense assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device. The punishment for such an aggravated offense extends to a fine of at least $10,000 and at least ten years of imprisonment. The fine is increased to up to $20,000 and the term of imprisonment is increased to at least twenty years for a conviction after a previous conviction under section 413, or under section 406 (21 U.S.C. 846) relating to a conspiracy to violate the section.

Subsection 413(c) provides for further increased punishment for anyone who commits or attempts pharmacy or registrant robbery or burglary in violation of subsection (a) and in the course of the offense kills or maims [6] another person. The punishment for such an aggravated offense is at least twenty years of imprisonment. The punishment for such offense following a previous conviction under section 413, or under section 406 (21 U.S.C. 846) relating to a conspiracy to violate the section, is at least forty years of imprisonment.

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[5] The Committee intends that "steal" be construed, as in other contexts in which that term is used in Federal criminal statutes, to reach all forms of theft, not only common law larceny. See *United States* v. *Turley*, 352 U.S. 407 (1957); *Bell* v. *United States*, —U.S. —(decided June 13, 1983).

[6] The Committee intends the concept of maiming to refer to the offense in 18 U.S.C. 114.

Subsection 413(d) provides that the imposition or execution of any sentence under the section (including a sentence under subsection (a) of a non-mandatory nature) shall not be suspended and probation shall not be granted.

Subsection 413(e) defines the term "pharmacist" as any person registered in accordance with the controlled Substances Act for the purpose of engaging in commercial activities involving the dispensing of any controlled substance to an ultimate user pursuant to the lawful order of a practitioner. Although the term "pharmacist" is not used in the new section 413—the Committee having substituted the term pharmacy—a pharmacy is to be construed as meaning a place where one or more pharmacists are regularly employed. It is not necessary for a violation of the section that a pharmacist be present. For example, a person would violate section 413(b) if he pointed a gun at a teen-age clerk working alone in a pharmacy at night in an attempt to obtain controlled substances.

Finally, Part O makes a change in section 406 of the Controlled Substances Act (21 U.S.C. 846) dealing with attempts and conspiracies. The section is changed to provide that a conspiracy relating to a violation of the new section 413, after a previous conviction for an attempt or conspiracy to violate the section, or after a previous conviction of a completed offense in violation of the section, is punishable by the same punishment provided for a second conviction for a violation of section 413. In other words, a person who has previously been convicted under this section of the burglary of a registered manufacturer and who then is convicted of conspiracy to commit pharmacy robbery in which someone is killed in violation of section 413(c), would be subject to imprisonment for at least forty years, as opposed to only twenty years if he had not had the previous conviction. The cross-reference in section 406 to an attempt in violation of section 413 is superfluous in light of the fact that section 413 itself contains attempt provisions in all necessary subsections.

TITLE XI—SERIOUS NONVIOLENT OFFENSES

Title XI consists of a group of miscellaneous nonviolent crime amendments divided into nine parts. In summary, they relate to child pornography (Part A); warning the subject of a search (Part B); Federal program fraud and bribery (Part C); counterfeiting of State and corporate securities and forging of endorsements or signatures on United States securities (Part D); receipt of stolen bank property (Part E); bank bribery (Part F); bank fraud (Part G); possession of contraband in prison (Part H); and livestock fraud in interstate commerce (Part I).

PART A—CHILD PORNOGRAPHY

1. In general

This provision of S. 1762 is identical to S. 1469 which was reported by the Committee on June 16, 1983, and was passed by the Senate on July 16, 1983.[1]

The current Federal law to combat the sexual exploitation of children—18 U.S.C. 2251-2253, and 2423—were enacted on February 6, 1978, in the Protection of Children Against Sexual Exploitation Act of 1977.[2] Oversight hearings on the scope of the problem and the Department of Justice enforcement program under these statutes were held November 5, 1982,[3] and April 1, 1982.[4] Following a Supreme Court case that held the obscenity standard was not constitutionally required with respect to child pornography,[5] bills were introduced to broaden the Federal law.[6] Legislative hearings were held on the subject in December 1982.[7] As noted, S. 1469, as reported, and this title emerged from this consideration of the national problem of sexual exploitation of children.

The clandestine nature of the child pornography industry precludes the availability of actual statistics on the number of children who are used in its production. Experts, however, estimate that the numbers range from the thousands to the hundreds of thousands. The 1977 Act (codified at 18 U.S.C. 2251 et seq.), with its requirement that material be produced for commercial purposes, served to deter large commercial producers. As a result, most of the initial production today consists of videotapes and still photographs, produced by individuals for their own use. The material thus produced is then shared and traded by the producer with other pedophiles.

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[1] See S. Rept. No. 98–169, 98th Cong., 1st Sess. (1983).

[2] Public Law 95–225; see S. Rept. No. 95–438, 95th Cong., 1st Sess. (1977); H. Rept. No. 95-696, 95th Cong., 1st Sess. (1977); *Protection of Children Against Sexual Exploitation*, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate, 95th Cong., 1st Sess. (1977).

[3] *Exploitation of Children*, Hearings Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. (1982).

[4] *Exploited and Missing Children*, Hearings Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982).

[5] See *New York* v. *Ferber*, 102 S. Ct. 3348 (1982).

[6] See S. Rept. No. 98–169, *supra* note 1 at 5.

[7] *Child Pornography*, Hearings Before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. (1982).

Frequently, this material produced for private use is pirated by commercial distributers. Consequently, the Federal agencies involved in enforcement of the Act, the Justice Department, the Federal Bureau of Investigation, the Postal Service and the United States Customs Service, agreed that the requirement that material be produced of distributed for a commercial purpose greatly hinders prosecutions. Their enforcement statistics bear this out.

At the April 1, 1982, hearings before the Subcommittee on Juvenile Justice the Department of Justice testified that since 1977, under all available obscenity statutes, 47 people had been indicted for distribution of material depicting minors. Forty-three of these people had been convicted, none were acquitted, and charges against three were pending because they were foreign nationals in countries with no extradition treaties.[8] However, because a commercial purpose must be shown for prosecution under the Federal child pornography laws but not under other Federal obscenity statutes (18 U.S.C. 1461, 1462), only 17 of these defendants were indicted under the tougher child pornography laws.[9]

At the same hearing, the FBI testified that at the request of both private citizens and other law enforcement agencies, the Bureau initiated 482 investigations under 18 U.S.C. 2251-2253 and 2423 (transporting minors for purposes of prostitution). These investigations resulted in eight complaints and four informations being filed and 33 indictments being returned. The FBI also confirmed that although most child pornography was produced for private use, it was frequently pirated for reproduction and distribution by commercial operators.[10]

This provision would address this problem by deleting the requirement that production and distribution be done for a commercial purpose.

On July 2, 1982, the Supreme Court upheld a New York Statute that prohibited the distribution of non-obscene works which depicted minors engaged in sexually explicit conduct.[11] In rejecting the claim that the statute infringed on the First Amendment, the Court found that when children are involved, States can restrict even non-obscene materials because the State's interest in protecting the physiological, emotional, and mental health of children supercedes First Amendment considerations.

When the Protection of Children Against Sexual Exploitation Act was considered by the Senate in 1977, it was unclear whether proof of obscenity would be constitutionally required before an individual could be prosecuted for the distribution of child pornography. In order to avoid a potential invalidation of the law on First Amendment grounds, the Act, as it emerged from the House-

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[8] See *Exploited and Missing Children* Hearings, *supra* note 4 at 18, 28-29.

[9] Id. at 22-23, 29.

[10] Id. at 37-40.

[11] *New York* v. *Ferber*, *supra* note 5.

Senate Conference, outlawed only the distribution of obscene materials depicting children in sexually explicit conduct.

It is impossible to quantify the effect of this obscenity requirement on Federal prosecutions. It is clear, however, that an obscenity requirement can serve as an impediment to conviction, even where the material at issue contains graphic depictions of sexual conduct by children. Robert Pitler's testimony before the Subcommittee on Juvenile Justice is illustrative of this. Mr. Pitler, who is Chief of the Appeals Bureau for the District Attorney's Office of Manhattan, and is the attorney who argued the *Ferber* case for the State of New York testified that:[12]

> * * * The deterrent value of a statutory ban on obscenity is effectively undercut by the difficulties in prosecuting obscenity cases successfully. The same difficulties in the prosecution of obscenity are present in a prosecution for disseminating materials depicting sexual conduct of children when a successful prosecution turns on proof of the obscenity of those materials.
>
> To begin with, the deterrent effect of obscenity laws is diminished because the concept of obscenity is complex, and its application to particular cases is a matter of considerable delicacy, resting often on highly elusive criteria * * *
>
> Indeed, in the *Ferber* case itself, the defendant was charged with two crimes, one of which required proof that the films sold were obscene. The other crime did not require proof of obscenity. Defense counsel agreed that those films were disgusting and offensive and told the jurors that they would well find the films repulsive, but still he called for an acquittal of the obscenity charge because the prosecution failed to prove the films appealed to the prurient interest of the particular group identified by the prosecutor. And the jury then acquitted Ferber on the obscenity charge.

The testimony before the Subcommittee unequivocally supports the conclusion that the children who become involved with child pornography suffer harm.[13] Because the Supreme Court has now settled the obscenity question, this provision of S. 1762 removes the obscenity requirement from the distribution offense to maximize the protection Federal law can offer to the Nation's children.

Removal of the obscenity requirement does not, however, operate as a wholesale bar to every picture of an unclothed child. The Court in the *Ferber* case noted:[14]

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be adequately defined by the applicable State law, as written or authoritatively con-

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[12] See *Child Pornography* Hearings, *supra* note 7 at 106–107.

[13] See, e.g., id at 120–138 (Statement of Dr. John Dillingham).

[14] *New York* v. *Ferber*, *supra* note 5 at 3358.

> strued * * * The category of "sexual conduct" proscribed must also be suitably limited * * *

The bill complies with this requirement by specifically detailing the prohibited conduct as actual or simulated:

(1) sexual intercourse;
(2) bestiality;
(3) sado-masochistic abuse;
(4) masturbation; or
(5) display of the genitals or pubic area for the purpose of arousing or inciting sexual desire.

Thus, for example, the parent who takes a picture of a child in the bath, the National Geographic photographer filming a primitive tribe, or the publication of a medical text which includes pictures of nude children would not fall within the prohibition of this provision. Conversely, the statute would apply when the prosecution could prove that a defendant photographed nude children for the purpose of distributing those photographs to pedophiles who would be sexually aroused by the material.

2. *Provisions of the bill, as reported*

Section 1101 sets out congressional findings that child pornography is a national industry, that thousands of youth are exploited by the production and distribution of child pornography and that the use of children as subjects of pornography is harmful to the children and to society.

Section 1102 rearranges and amends the provisions of the United States Code (18 U.S.C. 2251-2253) which prohibit the use of children in pornography and adds three new sections to chapter 110.

Section 2251 defines terms used in the chapter, and makes the following alterations from those definitions set forth in the section currently designated as 18 U.S.C. 2253:

(1) "minor" is defined as any person under age eighteen (current law is sixteen—18 U.S.C. 2253(1));
(2) "(for the purpose of sexual stimulation)" is stricken from the current description of sado-masochistic abuse at 18 U.S.C. 2253(2)(D);
(3) "lewd exhibition of the genitals or pubic area of any person" in 18 U.S.C. 2253(2)(E) is replaced with "a display of the genitals or pubic area of any person for the purpose of arousing or inciting sexual desire";
(4) "stimulated" is defined for the first time to clarify that only that stimulated conduct which creates an explicit appearance of prohibited sexual conduct is encompassed; and
(5) "producing" is redefined to eliminate the qualification that the product be for pecuniary profit.

Section 2252 recodifies 18 U.S.C. 2251 with amendments to subsection (e) to increase the fine for a first violation from $10,000 to $75,000 and from $20,000 to $150,000 for a second violation.

Section 2253 recodifies 18 U.S.C. 2252 and changes it by—

(1) eliminating the commercial purpose requirement from the distribution and receipt offenses. Instead, S. 1762 makes illegal any interstate transportation, mailing, shipment, receipt,

sale or distribution of material which visually depicts minors in sexually explicit conduct;

(2) eliminating from the distribution and receipt offenses the requirement that material which visually depicts minors in sexually explicit conduct be obscene. The obscenity requirement is retained only for materials which do not visually depict sexually explicit conduct;

(3) raising the fine for a first violation from $10,000 to $75,000; and

(4) providing for a $250,000 fine for organizations.

Section 2254 as added by this Part is an entirely new section to chapter 110 that establishes a criminal forfeiture remedy for persons convicted under the chapter. The section provides that any person convicted of violating any provision of section 2252 shall forfeit to the United States any interest acquired or maintained in violation of the section or any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 2252.

Section 2255 as added by this Part is another new section to chapter 110 to establish a civil forfeiture remedy. This new section provides that any material produced, transported, shipped, or received in violation of chapter 110, and any property constituting or derived from any proceeds obtained from a violation of the chapter, shall be forfeited.

This bill adds a final new section 2256 to chapter 110 to require that the Attorney General report periodically to Congress the number of cases and convictions brought under section 2252 and the dollar amount of any assets forfeited under section 2254.

PART B—WARNING THE SUBJECT OF A SEARCH

1. In general and present Federal law

This part of title XI provides for a new type of obstruction of justice offense. Under current 18 U.S.C. 2232 it is a misdemeanor to impair an authorized search by a law enforcement officer by removing, concealing, or destroying the property that is the object of the search in order to prevent its seizure. However, neither this section nor the general obstruction of justice offenses,[1] prohibit one person from warning another person that his property is about to be the subject of a search so that the latter person can himself remove or destroy it. Recently a local policeman attempted to warn a narcotics dealer that a Federal warrant to search his house had been issued. This reprehensible conduct could not be successfully prosecuted.[2] It is the purpose of Part B to close this unwarranted gap in present statutory law.

2. Provisions of this bill, as reported

Part B of title XI adds a new paragraph to 18 U.S.C. 2232 making it an offense for a person, having knowledge that a search or seizure has been authorized or is likely to occur, to give notice or attempt to give notice of the possible search or seizure to any person in order to prevent the authorized seizing or securing of any person, goods, or other property. A violation is made a felony punishable by up to five years in prison and a fine of $10,000. This penalty level is higher than the existing misdemeanor offense in 18 U.S.C. 2232 for impeding a search by destroying or removing the property, but is consistent with the general obstruction of justice statutes, 18 U.S.C. 1503, 1505, covering analogous conduct.

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[1] 18 U.S.C. 1503, 1505, 1512-1515.

[2] See *United States* v. *Brown*, 688 F.2d 596 (9th Cir. 1982). *Brown* involved a prosecution under 18 U.S.C. 1503 for corruptly endeavoring to impede the due administration of justice. The court of appeals held, however, that that statute reaches only efforts to interfere with a judicial proceeding.

PART C—PROGRAM FRAUD AND BRIBERY

1. In general

This part of title XI is designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program. The proposal is derived from S. 1630, the Criminal Code Reform Act of 1981 approved by the Committee in the 97th Congress.[1]

2. Present Federal law

As indicated, this part of title XI covers both theft and bribery type offenses. With respect to theft, 18 U.S.C. 665 makes theft or embezzlement by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a Federal offense. However, there is no statute of general applicability in this area, and thefts from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 U.S.C. 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds. Indeed, a recurring problem in this area (as well as in the related area of bribery of the administrators of such funds) has been that State and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved.

With respect to bribery, 18 U.S.C. 201 generally punishes corrupt payments to Federal public officials, but there is some doubt as to whether or under what circumstances persons not employed by the Federal Government may be considered as a "public official" under the definition in 18 U.S.C. 201(a) as anyone "acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function." The courts of appeals have divided on the question whether a person employed by a private organization receiving Federal monies pursuant to a program is a "public official" for purposes of section 201. The issue is due to be decided soon by the Supreme Court,[2] at least in the context of the particular HUD program involved in that case.[3]

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[1] See, e.g., sections 1731 (Theft) and 1751 (Commercial Bribery) of S. 1630 and the discussion at pages 726 and 803 of S. Rept. No. 97-307 (97th Cong., 1st Sess.).

3. Provisions of the bill, as reported

Part C adds a new section 666 to title 18, United States Code. Subsection (a) makes it a Federal crime for an officer, employee or agent of an organization or of a State or local government agency that receives benefits in excess of $10,000 per calendar year pursuant to a Federal program to steal, embezzle, obtain by fraud, willfully misapply or otherwise knowingly convert without authority property valued at $5,000 or more. The offense is punishable by up to ten years in prison and a fine of up to $100,000 or twice the value of the property obtained in violation of this section, whichever is greater. The terms "agent", "organization", "government agency", and "local" are defined in subsection (d) and require no further explication. The Committee intends that the term "Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance" be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery. However, the concept is not unlimited. The term "Federal program" means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime. It is, however, the intent to reach thefts and bribery in situations of the types involved in the *Del Toro, Hinton,* and *Mosley* cases cited herein.

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[2] See *United States* v. *Hinton,* 683 F.2d 195 (7th Cir. 1982), cert. granted *sub nom. Dixon* v. *United States* — U.S. — (1982) (Nos. 82-5279 and 82-5331).

[3] Contrast *United States* v. *Loschiavo,* 531 F.2d 659 (2d Cir. 1976) and *United States* v. *Del Toro,* 513 F.2d 656 (2d Cir.), cert. denied 423 U.S. 826 (1975), reaching the opposite result as to the bribery of certain persons administering funds from another HUD program. See also *United States* v. *Mosley,* 659 F.2d 812 (7th Cir. 1981) (involving bribery by a State administrator of funds from the CETA program).

PART D—COUNTERFEITING OF STATE AND CORPORATE SECURITIES AND FORGING OF ENDORSEMENTS OF SIGNATURES ON UNITED STATES SECURITIES

1. *In general and present Federal law*

Part D of title XI addresses two distinct problems involving securities crimes. The first, derived from S. 1630 as reported in the 97th Congress,[1] concerns the creation of a new offense for counterfeiting the securities of State and local governments or of corporations; the second would remedy a gap in existing statutes relating to the forging of endorsements on United States securities.

Present Federal law is inadequate to combat widespread fraud schemes involving the use of counterfeit State and corporate securities. As was first documented several years ago in hearings before the Senate Permanent Subcommittee on Investigations,[2] the use of these securities as collateral for loans and other illegal purposes is widespread and has a serious detrimental effect on interstate commerce. Moreover, these crimes commonly reach across State borders, and thus local officials are generally unable to cope with them.

With respect to the forging of endorsements on United States securities, violations involving forgery of endorsement or fraudulent negotiation of a Treasury check or bond or other security of the United States are sometimes successfully prosecuted under 18 U.S.C. 495. That statute was not, however, drafted to deal specifically with government obligations, but instead expressly covers deeds, powers of attorney, and contracts. The basis for using section 495 to prosecute violations with respect to government securities is the provision therein which punishes the forgery or alteration of "other writings". 18 U.S.C. 471 and 472 are concerned specifically with forgery and uttering forged obligations or securities of the United States. However, these sections apply to forgery of the security, not forgery of endorsements.

Because section 495 was not drafted to deal with obligations of the United States, many of the variations of offenses involved with the forgery of obligations are not included within that section and cannot otherwise be prosecuted under Federal law. For example, it is currently possible for a thief to steal a Treasury check endorsed by a payee, endorse his own name and obtain the proceeds, and not violate section 495. In addition, it is possible for a thief to steal one or more government checks or bonds from the rightful owner and sell them to a middle man and not violation section 495.

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[1] See S. Rept. No. 97-307, pp. 780-781.

[2] *Organized Crime; Securities Thefts and Frauds,* Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 93rd Cong., 1st Sess., Part 1, pp. 123-136.

2. Provisions of the bill, as reported

Part D would add a new section 510 to title 18, United States Code, proscribing the making, uttering, or possession of a counterfeited or forged security of a State or political subdivision thereof, or of an organization, with intent to deceive another person, organization, or government. It would also penalize the making, receipt, possession, sale or transfer of an implement designed or particularly suited for the making of a counterfeit or forged security with the intent that it be so used. In either case, a convicted offender would be liable for imprisonment of up to ten years and a $250,000 fine.

The section also contains elaborate definitions of the terms "counterfeited", "forged", and "security", as well as "organization" and "State". The first three definitions are taken from the counterfeiting and forgery subchapter of S. 1630, the Criminal Code reform legislation approved by the committee in the 97th Congress, and the Committee Report thereon should be consulted.

Part D would also add a new section 511 to title 18, United States Code, to proscribing the forging of any endorsement or signature on a security of the United States, or the passing, uttering or publishing of any such security bearing a forged endorsement or signature, with intent to defraud. Section 511 would also penalize whoever buys, sells, exchanges, receives, delivers, retains, or conceals a stolen United States security or one that bears a forged endorsement or signature knowing that the security is stolen or bears such an endorsement. Violations would be punishable by up to ten years in prison and a $250,000 fine, except that if the face value of the security did not exceed $500, the offense would be punishable as a misdemeanor by imprisonment of up to one year and a fine of $1,000. The term "forge" is defined in a manner substantively identical to its definition in the preceding section. The term "security" is defined to incorporate the definition in the preceding section as well as an "obligation of the United States", a term defined in 18 U.S.C. 8.

This proposal would make it possible to prosecute both forgeries of endorsement and related crimes involving obligations of the United States under one section. It would greatly assist the Secret Service, which has the primary jurisdiction to investigate crimes involving securities of the United States and which would have jurisdiction with regard to new section 511 by virtue of that section's amendment of 18 U.S.C. 3056(a) to include such violations in the list of enumerated sections for which the Secret Service has primary responsibility.[3] However, this provision is not intended to redistribute investigative responsibilities in any way. Specifically, for example, the United States Postal Service would retain primary jurisdiction to investigate thefts of United States securities from the mails.

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[3] Senators DeConcini and Denton have introduced legislation substantively very similar to proposed new section 511. See S. 1558 and S. 1710, 98th Cong., 1st Sess.

PART E—RECEIPT OF STOLEN BANK PROPERTY

1. In general and present Federal law

This Part of title XI is designed to remedy a flaw in current 18 U.S.C. 2113(c). That statute punishes whoever receives, possesses, conceals, sells, or disposes of any property "knowing the same to have been taken from a bank, credit union, or any savings and loan association" in violation of the preceding subsection which proscribes theft from such financial institutions. The problem is that, in requiring knowledge that the property was taken "from a bank" or other federally insured institution, the section is unduly generous to wrongdoers. It does not permit a successful prosecution in cases in which the proof is overwhelming that the defendant acted culpably in that he possessed property he knew had been stolen but where no evidence exists to show that he knew it had been stolen "from a bank". Normally, it should not be necessary to prove scienter as to what is essentially a jurisdictional fact—here, that the property was stolen from a bank; and the inclusion of this gratuitous element in section 2113(c) has occasionally resulted in the unwarranted exoneration of the knowing receivers of stolen property.[1]

2. Provisions of the bill, as reported

Part E rewrites 18 U.S.C. 2113(c) making only one substantive change. In place of the existing requirement of knowledge that property was taken "from a bank", the bill requires only proof of knowledge that the property "has been stolen". Thus, it closes the loophole under which certain knowing receivers of property stolen from a bank have escaped conviction.

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[1] See, e.g., *United States* v. *Kaplan*, 586 F.2d 980 (2d Cir. 1978); *United States* v. *Tavoularis*, 515 F.2d 1070 (2d Cir. 1975).

Part F—Bank Bribery

1. In general

This part revises and modernizes the statutory law dealing with bribery of bank officers. Sections 215 and 216 of title 18 presently cover the receipt of commissions or gifts by bank employees for procuring loans, but they are inadequate, unduly complex, and obsolete in many respects. For example, these sections do not reach bribery of employees of federally insured credit unions, or member banks of the Federal Home Loan Bank System, such as savings and loan associations, or of bank holding companies. The bill combines existing sections 215 and 216 to bring up to date the list of covered institutions and to make other improvements, including the prohibition of indirect as well as direct payments and an increase in applicable penalties. The proposal was contained in S. 1630, the Criminal Code reform bill approved by the committee last Congress,[1] and derives from legislation introduced a decade ago.[2]

2. Present Federal law

As noted, the commercial bribery aspects of Federal regulation of the banking industry are currently covered in 18 U.S.C. 215 and 216.

Under 18 U.S.C. 215, the officers, employees, and agents of banks the deposits of which are insured by the Federal Deposit Insurance Corporation, as well as certain other specified financial institutions,[3] are prohibited from stipulating for, receiving, or agreeing to receive anything of value from any person, firm, or corporation "for procuring or endeavoring to procure," for the giver or for anyone else, "any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by" any such bank or financial institution. The penalty is imprisonment for up to one year.

Significantly, this statute does not reach the bribe offeror, but only the recipient of the bribe, although the offering party can be punished by means of the aiding and abetting or conspiracy statutes. This statute has been held to punish receipt of a gift for procuring a loan even though the loan was completed before the gift or fee was received.[4] Because of the inclusion of the term "stipulates for," it has also been construed to proscribe the action of a bank officer who stipulated that a commission for obtaining loan from the bank be paid to a third party. The court found that Congress' purpose under this statute was to protect the deposits of Federally insured banks by preventing unsound and improvident loans to be made from such banks and that it was thus immaterial who received the commission.[5]

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[1] See S. Rept. No. 97-307, pp. 796-797.

[2] H.R. 6531 and S. 1428, 93rd Cong., 1st Sess. (1973).

[3] The other specified institutions are a "Federal intermediate credit bank" and a National Agricultural Credit Corporation.

[4] See *Ryan* v. *United States*, 278 F.2d 836 (9th Cir. 1960).

18 U.S.C. 216 is a somewhat broader statute that reaches payments made to employees and officials of Federal land bank institutions and small business investment companies. It punishes by up to one year in prison whoever, being an employee or official of the type described above, "is a beneficiary of or receives any fee * * * or other consideration for or in connection with any transaction or business of such association or bank, other than the usual salary or director's fee paid to such officer—or employee for services rendered." This statute also penalizes whoever causes or procures a Federal land bank institution or small business investment company to charge or receive any consideration not specifically authorized.

Experience under this statutory scheme has led to the conclusion that the above laws are inadequate and obsolete because they neither cover all of the individuals or institutions that should be covered nor all of the activities that should be illegal. As a result the Committee has endorsed the instant legislation that would combine 18 U.S.C. 215 and 216 into a single statute, punishing both bribe offerors or givers and bribe recipients, and expanding the institutions covered to include every financial institution the transactions of which the Federal Government has a substantial interest in protecting against undue influence by bribery (e.g., in addition to those presently covered under 18 U.S.C. 215 and 216, any member of the Federal Home Loan Bank System and any Federal Home Loan Bank; any institution the deposits of which are insured by the Federal Savings and Loan Insurance Corporation; any credit union the deposits of which are insured under the Federal Credit Union Act of 1934, as amended, etc.).

3. Provisions of the bill, as reported

Part F rewrites 18 U.S.C. 215 and repeals 18 U.S.C. 216. New section 215(a) is recast broadly to prohibit whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value, for himself or any other person other than such financial institution, from any person for or in connection with any transaction or business of such financial institution. The phrase "in connection with any transaction," etc. adopts the comprehensive style of current 18 U.S.C. 216 rather than the narrower method used in present 18 U.S.C. 215 to list the specific kinds of transactions reached. Also, the new section clearly proscribes the receipt of anything of value for a third person, thus carrying forward the interpretation in the *Lane* case, *supra*. Subsection (c) defines the terms "financial institution," "bank holding company" and "savings and loan holding company" to include all the types of federal financial institutions as to which there exists a strong federal interest to safeguard the transactions against undue influence by bribery. Subsection (b) proscribes activities of the same scope as subsection (a), but with respect to the bribe offeror or giver rather than the bribe taker or solicitor. Subsection (d), like present 18 U.S.C. 216, includes an explicit exemption for payments by the financial institution of the usual salary or director's fee paid to an officer, director, employee, agent, or attorney thereof, or for a reasonable fee paid by the financial institution to such persons for services rendered.

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[5] See *United States* v. *Lane*, 464 F.2d 593 (8th Cir.), cert. denied, 409 U.S. 876 (1972).

The penalty for a violation of subsection (a) or (b) is up to five years in prison and a fine of $5,000 or three times the value of the bribe offered, asked, given, received, or agreed to be given or received, whichever is greater, except that if such value is $100 or less the offense is punishable by up to one year in prison and a $1,000 fine. This grading has the effect generally of increasing the level of the kind of offenses now covered by 18 U.S.C. 215 and 216 from a misdemeanor to a felony. The Committee considers this increase justified in recognition of the strong Federal interest in deterring such crimes as they affect the banking industry and in view of the seriously culpable nature of the conduct involved. Notably, violations of other analogous statutes, such as 41 U.S.C. 54 proscribing commercial bribery with regard to government contractors, carry felony penalties. An exception from felony treatment is, however, provided for an offense where the bribe is relatively insignificant in amount and thus is less likely to have affected the recipient's conduct.

PART G—BANK FRAUD

1. In general and present Federal law

The offense of bank fraud in this part is designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured.

Recent Supreme Court decisions have underscored the fact that serious gaps now exist in Federal jurisdiction over frauds against banks and other credit institutions which are organized or operating under Federal law or whose deposits are federally insured. Clearly, there is a strong Federal interest in protecting the financial integrity of these institutions, and the legislation in this part would assure a basis for Federal prosecution of those who victimize these banks through fraudulent schemes.

The need for Federal jurisdiction over crimes committed against federally insured and controlled financial institutions has been recognized by the Congress in its passage of statutes specifically reaching crimes of embezzlement, robbery, larceny, burglary, and false statement directed at these banks. However, there is presently no similar statute generally proscribing bank fraud. As a result, Federal prosecutions of these frauds may now be pursued only if the circumstances of a particular fraud are such that the elements of some other Federal offense are met. Thus, whether Federal interests may be properly vindicated through prosecution turns on whether the fraudulent activity constitutes a crime under some other bank statutes, such as those governing larceny or false statement (18 U.S.C. 2113 and 1014), or whether the fradulent scheme involves a use of the mails or telecommunications that would permit prosecution under the mail or wire fraud statutes (18 U.S.C. 1341 and 1343).

This approach of prosecuting bank fraud under statutes not specifically designed to reach this criminal conduct is necessarily problematic. Nonetheless, for some time the Department of Justice had considerable success in using such statutes. The most useful of these was the mail fraud offense, for not only had the statute been held to reach a wide range of fraudulent activity, but also its jurisdictional element—use of the mails—could generally be satisfied in bank fraud cases because the collection procedures of victim banks ordinarily entailed use of the mails. In 1974, however, the utility of the mail fraud statute was notably diminished by the Supreme Court decisions in *United States* v. *Maze.*[1] In *Maze,* the Court held that proof that use of the mails occurred in or was caused by a fradulent scheme was insufficient for conviction under the mail fraud statute. Instead, proof that use of the mails played a significant part in bringing the scheme to fruition would be required. In addition to the problems of proof posed by the *Maze* decision, banks' increasing use of private courier services for collection purposes in lieu of the mails has further limited the instances in which the mail fraud statute may be used to prosecute bank fraud.

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[1] 414 U.S. 395 (1974).

The use of other Federal statutes to attack bank fraud as an alternative to prosecution under the mail fraud offense has also been circumscribed by recent court decisions. By virtue of the Supreme Court's decision last year in *Williams* v. *United States,*[2] the bank false statement offense, 18 U.S.C. 1014, may no longer be applied to address one of the most pervasive forms of bank fraud, check-kiting. In *Williams,* the Court concluded this form of fraud did not fall within the scope of 18 U.S.C. 1014 because a check did not constitute a "statement" within the meaning of the statute. As a result of this decision, the Committee has been advised by the Justice Department that it has been necessary to cease prosecution of numerous pending check-kiting cases. Similarly, there appears to be an absence of coverage with respect to some types of fraud in the general bank theft statute, 18 U.S.C. 2113. Although the Supreme Court recently held that section 2113 is not limited to common law larceny and reaches also certain offenses involving the obtaining of property from banks by false pretenses,[3] the Court noted that, by its clear terms, section 2113 "does not apply to a case of false pretenses in which there is not a taking and carrying away" of the property. These various gaps in existing statutes, as well as the lack of a unitary provision aimed directly at the problem of bank fraud, in the Committee's view create a plain need for enactment of the general bank fraud statute set forth in this part of title XI.

2. Provisions of the bill, as reported

Part G would create a new section 1344 of title 18, United States Code. Subsection (a) prohibits whoever knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a federally chartered or insured financial institution, or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises. The penalty for a violation is imprisonment of up to five years and a fine of $10,000.

The proposed bank fraud statute is modeled on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity. Like these existing fraud statutes, the proposed bank fraud offense proscribes the conduct of executing or attempting to execute "a scheme or artifice to defraud" or to take the property of another "by means of false or fraudulent pretenses, representations, or promises." While the basis for Federal jurisdiction in these existing general fraud statutes is the use of the mails or wire communications, in the proposed offense, jurisdiction is based on the fact that the victim of the offense is a federally controlled or insured institution defined as a "federally chartered or insured financial institution" in subsection (b) of the proposal. This term is defined to include all financial institutions whose deposits or accounts are insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, Federal home loan banks or member banks of the Federal home loan bank system, and any banks or other financial institutions organized or operating under the laws of the United States.

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[2] 102 S. Ct. 2088 (1982).

[3] *Bell* v. *United States,* — U.S. — (decided June 13, 1983).

Since the use of bogus or "shell" offshore banks has increasingly become a means of perpetrating major frauds on domestic banks and the considerable delay in collections between domestic and foreign banks makes manipulation of foreign financial transactions an attractive mode of defrauding banks within the United States, it is intended that there exist extraterritorial jurisdiction over the offense. This means that even if the conduct constituting the offense occurs outside the United States, once the offender is present within the country, he may nonetheless be subject to Federal prosecution.

In sum, the scope of present Federal statutes is not sufficient to assure effective prosecution of the range of fraudulent crimes commonly committed today against federally controlled or insured financial institutions. The legislative proposal contained in this part would meet the need for a statutory basis for asserting Federal jurisdiction over such offenses and would thereby better assure the integrity of the Federal banking system.

PART H—POSSESSION OF CONTRABAND IN PRISON

1. In general and present Federal law

This part is primarily designed to cure a defect in present law under which the introduction into, or movement from place to place within, a prison facility of a prohibited object by an inmate is an offense, but possession of such an object is itself not covered. The offense proposed in this part would close this gap, by adding a new section to title 18, United States Code. The new section is not designed to, and does not, replace the current statutes in this area, 18 U.S.C. 1791 and 1792. Rather, it creates a supplemental offense, limited to the possession of particularly dangerous types of contraband such as weapons, narcotics, and materials that may aid escapes.

Under 18 U.S.C. 1791 it is illegal for anyone, contrary to any rule or regulation promulgated by the Attorney General, to introduce or to attempt to introduce into or upon the grounds of a Federal penal facility "anything whatsoever." Furthermore, it is unlawful "to take or attempt to take or send" from such facility anything whatsoever contrary to any rule or regulation promulgated by the Attorney General.

To implement this prohibition, the Attorney General is granted authority under 18 U.S.C. 4001 to promulgate rules for the regulation of Federal penal facilities. Pursuant to such authority, the Attorney General has promulgated 28 C.F.R. 6.1 which provides that the introduction of "anything whatsoever" into any Federal penal facility or the taking or attempting to take or send anything therefrom "without the knowledge or consent of the warden or superintendent" of the facility is prohibited. The range of the regulation is thus extremely broad and prohibits anything at all from introduction or removal without the knowledge or consent of the warden.

18 U.S.C. 1792 makes it illegal to take into a prison "or from place to place therein" any firearm, weapon, explosive, or any lethal or poisonous gas, or any other substance or thing designed to kill, injure, or disable any prison employee or inmate.

Both 18 U.S.C. 1791 and 1792 carry a maximum penalty of ten years in prison. Because there is no differentiation with respect to different classes of contraband, this ten-year maximum applies whether the contraband is a weapon or merely a package of cigarettes.

The constitutionality of current sections 1791, 1792, and 4001 and 28 C.F.R. 6.1 has been consistently sustained against vagueness and overbreadth attack.[1]

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[1] See, e.g., *United States* v. *Park,* 521 F.2d 1381-1384 (9th Cir. 1975); *United States* v. *Chatman,* 538 F.2d 567 (4th Cir. 1976); *United States* v. *Berrigan,* 482 F.2d 171 (3d Cir. 1973); *United States* v. *Swindler,* 476 F.2d 167 (10th Cir.) and cases therein cited, cert. denied, 414 U.S. 837 (1973).

2. Provisions of the bill, as reported

This part of title XI adds a new section, 1793, to the two preceding sections described above. The new section creates two offenses, set forth in subsections (a) and (b).

Subsection (a) provides that whoever, being an inmate in a Federal penal or correctional institution, makes, possesses, procures, receives, or otherwise provides himself with any object "that may be used as a means of facilitating escape" contrary to any rule or regulation promulgated by the Attorney General, may be punished by up to one year in prison and a $1,000 fine.

Subsection (b) reaches the identical persons (i.e. inmates in a federal penal institution) and prohibits the identical conduct (i.e. making, possessing, etc. certain items proscribed in regulations issued by the Attorney General) as described in subsection (a), but covers a more serious class of prohibited items—namely "any firearm (as defined in section 921 of this title), any other weapon or object intended for use as a weapon, or a narcotic drug" as defined in 21 U.S.C. 802. The maximum penalty is imprisonment for up to ten years and a fine of $10,000. Moreover, the section provides that, if imprisonment is imposed, the sentence shall not be suspended, shall not run concurrently with any other prison sentence including that being served at the time of the offense, and shall not be subject to parole.

Both offenses thus follow the format of existing 18 U.S.C. 1791 in delegating authority to the Attorney General to issue regulations enumerating or describing the kinds of objects that may be the subject of criminal sanctions under this section. With respect to weapons, currently covered in 18 U.S.C. 1792, this adds an element of proof since under that statute there is no proof required that a dangerous weapon was prohibited by any regulation. However, this added requirement should pose no practical problem because 28 C.F.R. 6.1 need only be amended to track the language and prohibitions of new section 1793 as it does now for section 1791.

An example of the type of conduct to be reached by these provisions can be found in *United States* v. *Bedwell.*[2] There the defendant was observed by a shop foreman sharpening a piece of metal on a belt sander in an apparent attempt to manufacture a knife. He suspiciously dropped the object upon being approached. Prosecution under 18 U.S.C. 1792 failed because there was no proof that the defendant had moved the object from place to place in the facility. Prosecution under 18 U.S.C. 1791 probably would not have been successful because all the parts of the home-made knife appeared to have been brought into the prison properly. Under proposed section 1793, however, conviction would be possible if from the facts it could be shown that, contrary to a statute, rule, regulation, or order, the defendant was knowingly making or possessing an object which was intended for use as a weapon or which could be used as a means of facilitating escape.

With respect to the types of things reached by section 1793, there is obviously no purpose to cover the entire range of prohibited items now within the ambit of section 1791. However, it should be noted that subsection (a) states an objective test and is quite broad. Thus, under that subsection, the class of objects that may be proscribed by regulation extends to anything "that may be used as a means of facilitating escape". By contrast, subsection (b) in part sets forth a subjective standard, extending to any object "intended for use as a weapon". Subsection (a) therefore should cover seemingly innocuous items that could be used to facilitate escape. For example, yeast can be used as an ingredient in an explosive device; tin cans of food can be converted into knives and keys; and letters that do not pass through prison censorship can be used to plan escapes. It is expected that the regulations issued by the Attorney General will specify a list of prohibited items, such as firearms, drugs, or letters not passed through censorship, or will define the prohibition in terms of circumstances surrounding the conduct. For example, with respect to kitchen table knives or forks, the regulation could prohibit the possession of such items outside the dining area, or regarding pieces of metal in a workshop, the regulations could prohibit the concealment of such items.

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[2] 456 F.2d 448 (8th Cir. 1972).

Unlike sections 1791 and 1792, this section creates a grading distinction depending on the potential harmfulness of the object prohibited. The Committee believes that an overhaul of existing sections 1791 and 1792 to create rational penalty distinctions is appropriate but has not undertaken this task here.[3] This section punishes at a ten-year felony level the possession by an inmate of a prohibited firearm, destructive device or other object intended for use as a weapon, or a narcotic drug. These are the items that are the most dangerous to be found within a prison. The drugs included are considered the most dangerous controlled substances—heroin, cocaine, and the like—whose presence in a prison which often houses numerous former addicts is most disruptive of prison safety and discipline. Punishment at a one-year level is reserved for other objects that may be used to facilitate escape but that are not weapons or intended for use as weapons.

Finally, it should be mentioned that the offense in section 1793, like that in section 1791, was deliberately written to apply only to inmates (whether convicted in a Federal or State court) in a Federal penal institution. The Committee has not sought to extend coverage to Federal defendants incarcerated in State institutions, believing that the primary interest in barring contraband from those institutions lies with State or local officials.

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[3] Such a comprehensive revision was included in S. 1630, the Criminal Code Reform legislation approved by the Committee in the 97th Congress. See section 1314 of that bill and the discussion in S. Rept. No. 97-307, pp. 331-335.

PART I—LIVESTOCK FRAUD

1. In general and present Federal law

The purpose of this Part of title XI is to create specific offenses relating to theft and fraud involving livestock and thereby to establish the basis for a strong Federal response to interstate livestock crimes. The provisions of this Part were added to S. 1762 in Committee through an amendment offered by Senator Baucus and are identical to legislation introduced by Senator Baucus in the 97th Congress,[1] which was also embodied in substance in S. 1630, the Criminal Code Reform legislation approved last Congress by the Committee.[2]

Livestock transactions in this country constitute a substantial industry, amounting to approximately fifty billion dollars per year. Unfortunately, however, the Committee has received indications that thefts and frauds with respect to livestock have increased in recent years and that often local law enforcement cannot successfully cope with these crimes, the investigation and prosecution of which is frequently a complex matter involving interstate commerce and various financial instruments used to perpetrate frauds.[3] Although some Federal statutes exist which may be utilized to prosecute some types of livestock offenses, there is no single statute of sufficient breadth directed expressly to this species of crime. The proposal in this Part is designed to provide such coverage thus facilitating Federal efforts to combat livestock fraud.

The only specific Federal offenses on the books aimed at certain livestock crimes are found in sections 2316 and 2317 of title 18, United States Code. These statutes, enacted in 1948, deal with cattle. They punish by up to five years in prison and a $5,000 fine whoever transports cattle in interstate or foreign commerce knowing the cattle to have been stolen, or whoever receives, conceals, stores, buys, sells, or disposes of cattle moving in or constituting a part of interstate or foreign commerce, knowing the same to have been stolen.

In addition, 18 U.S.C. 2314 punishes generally whoever transports in interstate or foreign commerce "any goods, wares, [or] merchandise" of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud. Section 2314 also prohibits, in language similar to that employed in the mail and wire fraud statutes,[4] whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transports or causes to be transported, or induces any person to travel, in interstate commerce "in the execution or concealment" of a scheme or artifice to defraud involving property having a value of $5,000 or more. The penalty is up to ten years in prison and a $10,000 fine.

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[1] S. 932.

[2] See section 1731 of that bill and the discussion thereof in S. Rept. No. 97-307, pp. 707-727.

[3] See remarks of Senator Baucus upon the introduction of S. 932, appearing at 127 Cong. Rec. S. 3705 (daily ed. April 8, 1981).

[4] 18 U.S.C. 1341, 1343.

With respect to the first branch of section 2314, it is not yet clear from the decided cases whether its scope reaches animate property such as livestock. In what is apparently the only comprehensive ruling on this issue, a district court in 1959, after extensively analyzing the legislative history, held that animals (in that case a Shetland pony) are included within the meaning of the terms "goods, wares, [or] merchandise".[5] While this interpretation seems correct, this fact does not eliminate the need for additional legislation covering livestock explicitly, in view of the lack of definitive appellate court holdings. Moreover, investigators and prosecutors might not always appreciate, from the language used in section 2314, the possibility of applying its provisions as a means of vindicating livestock thefts.

The second branch of section 2314, by contrast, seems clearly to embrace fraud involving livestock. However, its reach is limited by the circumstances that (1) it proscribes only fraudulent-type conduct, not outright theft, and (2) it requires that a person travel in interstate commerce (not foreign commerce) "in the execution or concealment" or the crime.[6] Thus, many kinds of crimes involving livestock in which there might exist a substantial Federal interest could not be pursued under this statute.[7]

2. Provisions of the bill, as reported

Part I both expands existing 18 U.S.C. 2316 and 2317 and creates a new offense that more broadly proscribes livestock crimes. The bill amends sections 2316 and 2317 by striking the word "cattle" and substituting "livestock". This has the effect of enlarging the scope of those current statutes to reach any crimes involving the interstate transportation, receipt, or disposition of livestock known to have been stolen. The Committee intends to perpetuate the construction of the term "stolen" as extending to all manner of felonious takings, without regard to whether the theft constitutes common law larceny.[8] The term "livestock" is intended to carry its ordinary dictionary meaning of domestic animals raised for home use or profit, such as horses, sheep, pigs, and goats.

The bill also adds a new section 666, to title 18, United States Code. The wording of this offense is derived closely from the general theft offense (section 1731) in the Criminal Code Reform bill, S. 1630, approved by the Committee in the 97th Congress. It punishes whoever "obtains or uses the property of another which has a value of $10,000 or more in connection with the marketing of livestock in interstate or foreign commerce with intent to deprive the other of a right to the property or a benefit of the property or to appropriate the property to his own use or the use of another". The penalty is up to five years in prison and a $10,000 fine.

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[5] *United States* v. *Taylor,* 178 F. Supp. 352 (E.D. Wis. 1959); cf. also *United States* v. *Plott,* 345 F. Supp. 1229 (S.D.N.Y. 1972).

[6] It is not clear what limitations, if any, are implicit in the phrase "in the execution or concealment". Conceivably, though by no means necessarily correctly, a court might construe this to mean that the interstate travel must occur in the consummation phase of the crime rather than, e.g., during the planning stage.

[7] Finally, it should be noted that the general mail and wire fraud statutes, 18 U.S.C. 1341 and 1343, may in some instances be able to be employed against livestock fraud, assuming that use of the mails or an interstate wire facility played a significant role in the crime. See *United States* v. *Maze,* 414 U.S. 295 (1974).

[8] See *Cummings* v. *United States,* 289 F.2d 904 (10th Cir.), cert. denied, 368 U.S. 850 (1961).

The Committee intends that the discussion of the phrases "obtains or uses", "property", "property of another", and "with intent to deprive", etc., in the report on section 1731 of S. 1630[9] be deemed applicable here. Thus, for example, "obtains or uses" is intended to include any manner of theft, stealing, larceny, embezzlement, misapplication, conversation, obtaining property by false pretenses, fraud, deception, and all other conduct similar in nature. "With intent to deprive the other of a right to the property" is intended not to incorporate the restrictive common law larceny concept of an intent to appropriate or deprive another of property *permanently*; an intent to cause a temporary deprivation or appropriation is also covered. Under this offense, however, unlike the amended 18 U.S.C. 2316 and 2317, only crimes of the magnitude of $10,000 or more are within the statute. This jurisdictional floor (like the $5,000 floor in the first branch of 18 U.S.C. 2314) is designed to confine Federal jurisdiction to substantial violations. Minor livestock crimes that did not involve interstate transportation of the stolen livestock (so as to be reachable under section 2316 and 2317) would be left for local prosecution. Finally, considering the $10,000 floor in the new offense, the phrase "in connection with the marketing of livestock in interstate or foreign commerce" is intended to have a scope enabling Federal prosecution of crimes in situations that go beyond interstate or foreign transportation of the livestock. For example, the new section would reach a fraud in which a contract to "market" (i.e. sell or dispose of) livestock was entered into, in whole or part, on the basis of interstate travel or communications but where the livestock remained intrastate.

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[9] See Rept. No. 97-307, pp. 707-716.

TITLE XII—PROCEDURAL AMENDMENTS

Title XII consists of a number of procedural amendments to improve the operation of the Federal criminal justice system. In summary, they relate to prosecution of certain juveniles as adults (Part A); wiretap amendments (Part B); expansion of venue for threat offenses (Part C); injunctions against fraud (Part D); government appeal of post-conviction new trial orders (Part E); clarification of change of venue for certain tax offenses (Part G); and amendments to 18 U.S.C. 951 (Part H).

PART A—PROSECUTION OF CERTAIN JUVENILES AS ADULTS

INTRODUCTION

Part A of title XII amends 18 U.S.C. 5032 and 5038, provisions of the Juvenile Justice and Delinquency Act of 1974, passed by the Ninety-Third Congress.[1] The essential concepts of the 1974 Act are that juvenile delinquency matters should generally be handled by the States and that criminal prosecution of juvenile offenders should be reserved for only those cases involving particularly serious conduct by older juveniles. The Committee continues to endorse these concepts, but has determined that certain modifications in current law are necessary to allow an adequate Federal response to serious criminal conduct on the part of juveniles.

Juveniles account for nearly half of our violent crimes. The Committee's goal is to identify, convict, and incarcerate the small number of juveniles who commit the most violent crimes.

Evidence given during hearings by the Subcommittee on Juvenile Justice, including studies by Professor Marvin Wolfgang and the Rand Corporation, document that the most active criminal periods occur between the ages of sixteen and twenty-two years. These provisions of the bill provide a process that enhances the ability of the criminal justice system to deal effectively with violent youthful offenders between the ages of 15 and 18.

Present Federal law establishes five specific criteria which must be considered by the court in making the determination to treat a juvenile as an adult on motion of the Attorney General. The Committee believes that additional, mandatory provisions for treating juveniles as adults are needed.

Initially, it was proposed that the age of majority and the minimum age for treatment as an adult should be lowered. During the hearings the testimony of the National Council of Juvenile and Family Court Judges and the American Bar Association expressed concern over those provisions. The Committee agrees that the concern generated by these provisions justified deleting from the reported version of the bill the provision that would have lowered the age of majority.

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[1] Public Law No. 93-415, 88 Stat. 1109.

Confidentiality of juvenile records has been protected at the expense of informed decision-making by Federal judges in cases involving juveniles. The Committee determined that the interest to society in identifying and tracking youthful offenders under some circumstances must take precedence over the juvenile offender's interest in confidentiality.

In addition, fingerprints, photographs, and records of prior convictions must be maintained on juveniles charged with an offense that if committed by an adult would be a crime of violence.

The Committee believes these amendments will equip the juvenile justice system with tools adapted to meet the challenges posed by today's violent youths. Subjecting these youths to closer scrutiny by the courts, while subjecting the courts to closer scrutiny by the public, will lead to a fairer, more effective juvenile justice system.

SECTION 1201

1. In general

Section 1201 of title XII amends 18 U.S.C. 5032, the provision of current law which governs proceedings against juvenile offenders. The most significant of these amendments are those which would allow retention of Federal jurisdiction over a juvenile offender on the basis of a substantial Federal interest in the offense charged and which would expand the authority to proceed against older juveniles charged with particularly serious offenses in a criminal prosecution rather than a juvenile delinquency adjudication.

2. Present Federal law

The juvenile delinquency provisions of 18 U.S.C. 5032 control the disposition of offenders up to the age of 21, if the crime involved was committed before the offender's eighteenth birthday.[2] Currently, all such juveniles charged with Federal offenses must be transferred to appropriate State authorities unless the Attorney General certifies, after investigation, that the State does not have or refuses to assume jurisdiction over the juvenile or that the State does not have available programs or services adequate for the needs of juveniles. Only if such a certification is made may the juvenile be proceeded against federally.

If Federal jurisdiction over the juvenile is retained, he must generally be proceeded against in juvenile delinquency proceedings. Criminal prosecution of juveniles under the age of 16 is strictly barred.[3] For juveniles over 16, criminal prosecution is permitted only if the offense involved is one that, if committed by an adult, would be a felony punishable by a maximum penalty of ten years of imprisonment or more or death, and the court makes a determination, after a hearing, that a transfer for prosecution would be "in the interest of justice." In making this determination, the court must consider and make findings for the record regarding the following factors: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; and the availability of programs designed to treat the juvenile's behavioral problems.

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[2] See 18 U.S.C. 5031.

[3] A juvenile may waive his right to be proceeded against in a juvenile delinquency proceeding if he makes a written request upon advice of counsel to be proceeded against as an adult. 18 U.S.C. 5032.

3. Provisions of the bill, as reported

Subsection (a) of section 1201 amends the first paragraph of 18 U.S.C. 5032, which defines the circumstances in which a juvenile[4] charged with a Federal offense must be surrendered to State authorities. As noted above, such a surrender presently must occur unless the Attorney General certifies that the State is unwilling or unable to exercise jurisdiction or has no adequate juvenile programs or services. Section 1201(a) carries forward the current certification requirement, but adds two additional circumstances under which surrender to State authorities is not required.

First, a general exception is made for those juveniles charged with offenses committed within the special maritime and territorial jurisdiction of the United States that are misdemeanors punishable by no more than six months of imprisonment. In such cases, the certification procedure need not be used although diversion to State authorities is still preferred where possible. This change in current law is designed to cure a practical problem that has arisen. Statutory authority exists for creation of petty offenses, by means of regulations, that govern conduct in national parks and lands.[5] In large measure, these offenses, which carry a six-month maximum term of imprisonment, cover such matters as driving regulations, littering ordinances, and the like. When a juvenile is charged with one of these offenses committed in a national park, he is usually interested in speedy disposition and, in most cases, the States are reluctant to assume jurisdiction over the juvenile. The delay attendant in meeting the current certification after "investigation" requirement for a juvenile far from his home charged with a petty offense such as a driving violation creates a sizable and an unreasonable burden for both the juvenile and the court. In these cases, summary disposition is in everyone's interest. Accordingly, the Committee has decided to eliminate the certification requirement for such petty offenses when committed within the special territorial jurisdiction of the United States. A similar provision has been incorporated in past criminal code reform legislation approved by the Committee.[6]

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[4] The age of persons considered "juveniles" for purposes of 18 U.S.C. 5032 is unchanged. S. 829, as introduced, would have lowered the age of majority for purposes of this section from 18 years at the time of commission of the offense to 17 years. Opinions received by the Committee varied sharply on the advisability of this proposal. Crime Control Act Hearings (*compare* Statement of James Knapp, Deputy Assistant Attorney General, Department of Justice, with Statement of Judge W. Donald Reader, National Council of Juvenile and Family Court Judges). While the Committee agreed that criminal prosecution of older juveniles charged with particular serious offenses is often merited, it determined that the better approach was to strengthen the bases for invoking criminal prosecution on a case-by-case basis, rather than to adopt a flat lowering of the age of majority.

[5] 16 U.S.C. 3.

[6] See S. Rept. No. 97-307, p. 1179 (1981).

Second, the Committee has added a third category to existing law that would permit the disposition of a case involving a juvenile charged with a serious felony by means of a Federal proceeding. This would be permissible if the Attorney General certifies that the offense is a felony crime of violence [7] or a serious drug offense described in 21 U.S.C. 841, 952(a), 955, or 959, and that there is a "substantial Federal interest in the case or offense to warrant the exercise of Federal jurisdiction." This change adopts in part the recommendation of the Attorney General's Task Force on Violent Crime that the Federal Government assume original jurisdiction over Federal crimes by juveniles,[8] and is substantially the same as a provision in the Criminal Code Reform legislation approved by the Committee in the last Congress, S. 1630.[9] The Committee has limited the provision to serious violent felonies and drug offenses so that the Federal Government will continue to defer to State authorities for less serious juvenile offenses. Moreover, the Committee intends that a determination that there is a "substantial Federal interest" be based on a finding that the nature of the offense or the circumstances of the case give rise to special Federal concerns. Examples of such cases could include an assault on, or assassination of, a Federal official, an aircraft hijacking, a kidnaping where State boundaries are crossed, a major espionage or sabotage offense, participation in large-scale drug trafficking, or significant and willful destruction of property belonging to the United States.

Subsection (b) of section 1201 amends the fourth paragraph of 18 U.S.C. 5032, which governs the circumstances in which a juvenile may be prosecuted as an adult.[10] The Committee is aware of the extensive controversy in recent years over the appropriate age separating the juvenile delinquent from the adult offender.[11] On the one hand, it is argued that juvenile offenders are different in kind from adult offenders, and that rehabilitation should be the primary goal in determining how young offenders should be treated. On the other hand, there is growing concern about the high percentage of violent crime committed by juveniles who have records of criminal activity, and growing recognition that for some of these juveniles, the rehabilitation theory upon which the current juvenile justice system is based is not always adequate to protect the public interest. Presently, approximately 20 percent of violent crimes and 44 percent of serious property crimes are committed by persons under eighteen, and such serious criminal activity is not confined to older juveniles; in 1979, juveniles under fifteen accounted for more than 5 percent of violent crimes and 16 percent of serious property crimes.[12]

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[7] The term "crime of violence" is defined in 18 U.S.C. 16, as added in section 1001 of the bill.

[8] Attorney General's Task Force on Violent Crime, Final Report, Recommendation No. 59, 83 (1981).

[9] See S. Rept. No. 97-307, p. 1179 (1981).

[10] The criteria for prosecution of a juvenile as an adult are entirely separate from the criteria which governs whether a juvenile must be surrendered to State authorities. Only if the criteria for retaining Federal jurisdiction over a juvenile in the first instance (discussed *supra* in relation to section 1201(a)) are met, may there then be consideration of whether Federal prosecution, as opposed to a Federal juvenile delinquency proceeding, is appropriate.

[11] See S. Rept. No. 97-307, pp. 154-155 (1980) and materials cited therein.

[12] Crime Control Act Hearings (statement of James I. Knapp of the Department of Justice concerning prosecution of juveniles as adults, pp. 2 and 6).

The disproportionate commission of serious felonies by youths,[13] the increasing juvenile crime rate,[14] and growing dissatisfaction with rehabilitation as an achievable goal,[15] have caused a number of States to amend their juvenile statutes in order to enable prosecution of certain juveniles as adults.[16] Presently, more than half of the States permit adult prosecution of certain juveniles under the age of sixteen, the minimum age for prosecution provided in current Federal law.[17]

The Committee shares many of the concerns about the juvenile crime problem that have led to increased authority to prosecute young offenders in the States. Accordingly, while the Committee continues to believe that criminal prosecution is not appropriate for most juvenile offenders, it has determined that in some respects the bases for Federal prosecution of youths committing particularly serious offenses is too limited and that some expansion of the bases for prosecution is necessary.

The authority to prosecute juveniles charged with Federal offenses is enlarged, although only moderately, in three respects. First, the current minimum age for prosecution at sixteen has been lowered to fifteen.[18] Second, the types of offenses which may trigger a motion for prosecution on the part of the government will no longer be limited to offenses punishable by ten or more years of imprisonment. Prosecution may be sought if the offense charged is a crime of violence or one of four specified serious drug offenses.[19] The current limitation to ten-year felonies excludes such serious offenses as assault with a deadly weapon (18 U.S.C. 13(c)), certain arson offenses (18 U.S.C. 81), and trafficking in certain Schedule I and II controlled substances such as PCP and LSD (21 U.S.C. 841(b)(1)(B)). The third change provides a limited exception to the rule in current law that prosecution of a juvenile is permitted only upon the court's determination, after a hearing, that a transfer for prosecution is "in the interest of justice." In the Committee's view, it is generally appropriate that a case-by-case determination be made whether prosecution of a juvenile is merited. However, where a juvenile is charged with a serious crime involving violence against persons or a particularly dangerous crime involving destruction of property, and he has previously been found guilty of such a serious offense, this fact alone should serve as adequate justification for prosecution of the juvenile. Therefore, section 1202(b) provides that in such cases involving repeat offenders charged with felony crimes against the person or serious property destruction crimes involving destruction of aircraft (18 U.S.C. 32), arson (18 U.S.C. 81), destruction of property through use of explosives (18 U.S.C. 844 (d), (e), (f), (h), (i)) or setting fire to vessels (18 U.S.C. 2275) who also have records of similarly serious offenses, transfer of the case for prosecution, upon motion of the government, is to be mandatory.

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[13] Attorney General's Task Force on Violent Crime, Final Report, 81 (1981); Empey, *Juvenile Lawbreaking: Its Characteristics and Social Location, in Juvenile Justice: The Progressive Legacy and Current Reforms,* pp. 78–79 (1980); A. Vachss and Y. Bakal, *The Life-Style Violent Juvenile,* pp. 15, 30, n. 59 (1979).

[14] Gilman, *IJA/ABA Juvenile Justice Standards Project: An Introduction,* 57 B.U.L. Rev. 617 (1977); Hamperian, *Introduction to Youth in Adult Courts,* reprinted in *Major Issues in Juvenile Justice Information and Training,* 169 (J. Hall, D. Hamperian, J. Pettibone, and J. White, eds. 1981).

[15] Hellum, *Juvenile Justice: The Second Revolution, Crime and Delinquency,* 299, 302–03 (July 1979).

[16] Shackman, *New York's New Juvenile Felony Law,* 19 Judges Journal 33 (1980); Hellum, *supra* note 15 at 299, 300; IJA/ABA Juvenile Justice Standards, *Standards Relating to Transfer Between Courts,* commentary to Standard 1.1B (1979).

[17] S. Rept. No. 97–307, p. 155 (1981).

[18] S. 829 as introduced would have lowered the minimum age of prosecution to fourteen. Strong arguments were made in favor of retaining the current age limit of sixteen. Crime Control Act Hearings (Statement of Judge W. Donald Reader, National Council of Juvenile and Family Court Judges). The Committee determined that some reduction in the current age limit was needed and agreed on an age of fifteen.

[19] 21 U.S.C. 841, 952(a), 955, or 959.

These amendments provide needed authority to prosecute the most serious instances of juvenile criminal conduct, yet at the same time preserve the principles that criminal prosecution should be reserved for only the most dangerous juvenile offenders and permitted only when merited under the facts of a particular case.

Subsection (c) of section 1201 adds three new paragraphs to 18 U.S.C. 5032. The first addresses the situation in which a juvenile is transferred for prosecution and is convicted, but not on the charge on which the transfer for prosection was based, but on a lesser charge which could not have supported the prosecution transfer. The first new paragraph added by section 1202(c) provides that in such a case, the disposition of the juvenile is to proceed in the same manner as if he had been adjudicated delinquent rather than criminally convicted. If a juvenile is convicted of a charge that could not have supported the original transfer of his case, he should not be held to the consequences of criminal conviction but rather should be treated as though he had been adjudicated delinquent.

The second new paragraph added to 18 U.S.C. 5032 provides that proceedings with respect to a juvenile are not to commence until any prior juvenile court records of the juvenile have been received by the court, or the clerk of the court certifies that the juvenile has no prior record or that the records are unavailable and why. In many respects, determination of whether a young offender is to be treated as a juvenile or an adult and of the appropriate disposition of juveniles adjudicated delinquent depends on the nature of the juvenile's prior record. Too often, however, juvenile proceedings are undertaken without the benefit of such information. This new paragraph stresses that these records be obtained beforehand whenever possible. The Committee intends, however, that this new provision's requirements are to be understood in the context of a standard of reasonableness. Thus, if reasonable efforts to obtain a juvenile's records have been made, certification of their unavailability is permissible. Also, the Committee intends that this new requirement be applied with a degree of flexibility so that stages of proceedings to which such records are not relevant are not delayed pending arrival of the records. Thus, it is appropriate that a hearing concerning a transfer for prosecution await the arrival of a juvenile's court records, since they are highly relevant to the transfer decision. However, it would also be appropriate to commence delinquency proceedings (provided the government had not moved for a transfer for prosecution) but stay the subsequent dispositional hearing pending receipt of the records by the court, since such records are relevant to the proper disposition of the offender, but not to the initial delinquency adjudication. However, it is stressed that this new provision does not supersede speedy trial requirements of 18 U.S.C. 5036.

The final paragraph added to 18 U.S.C. 5036 by section 1202(c) simply provides that the specific acts a juvenile has been found to have committed are to be described as part of the official record of the proceedings and as part of the juvenile's official record. The criminal justice system cannot effectively deal with repeat juvenile offenders if it does not have complete and accurate information about their past offenses.

SECTION 1202

1. In general and present Federal law

Provisions designed to protect the confidentiality of records of juvenile proceedings are set out in 18 U.S.C. 5038. Under these provisions, the records of a delinquency proceeding must be placed under seal. Afterwards, such records may be released by the court only if they are sought in connection with six specified law enforcement purposes. This provision of current law also prohibits, without court consent, the fingerprinting and photographing of juveniles adjudicated delinquent. Routine fingerprinting and photographing is permitted only with respect to juveniles prosecuted as adults.[20] Subsection (d)(2) of 18 U.S.C. 5038 also prohibits making public the name or picture of a juvenile "by any medium of public information" in connection with a juvenile delinquency proceeding.

2. Provisions of the bill, as reported

Section 1202 does not alter the provisions of current 18 U.S.C. 5038 which guard against improper disclosure of juvenile records. Its amendments to this provision of current law are confined to two areas. First, 18 U.S.C. 5038(d) has been amended to provide for the fingerprinting and photographing not only of juveniles prosecuted as adults, as permitted under current law, but also of juveniles adjudicated delinquent with respect to offenses that are felony crimes of violence or serious drug crimes. Fingerprints and photographs are essential investigative tools, especially in the case of violent crimes, and as noted above, juveniles commit a disproportionate number of these crimes. Thus, the Committee has amended 18 U.S.C. 5038 to permit the creation of these records for juveniles who have committed serious violent or drug offenses. This is in accord with a recommendation of the Attorney General's Task Force on Violent Crime.[21] Fingerprints and photographs of juveniles not prosecuted as adults may be made available only in accordance with the provisions of 18 U.S.C. 5038(a).

The second amendment to 18 U.S.C. 5038 clarifies the current prohibition on making the name or picture of a juvenile public in connection with a juvenile delinquency proceeding "by any medium of public information." The quoted phrase, which implies that a newspaper could not publish the name or photograph of a juvenile it had legitimately obtained, has been deleted. The Supreme Court has held, in interpreting a West Virginia statute that made such publication illegal, that the First amendment will not permit the State to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by the newspaper.[22] The deletion of the quoted language brings this provision into accord with this ruling.[23] However, this provision, along with current 18 U.S.C. 5038(c) dealing with the duty of court officers, will continue to bar the release of such information by court officials.

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[20] 18 U.S.C. 5038(d)(1).

[21] Attorney General's Task Force on Violent Crime, Final Report, Recommendation No. 58, p. 82 (1981).

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[22] *Smith* v. *Daily Mail Publishing*, 433 U.S. 97 (1979).

[23] The provision regarding improper disclosure of the name or picture of a juvenile which currently appears as 18 U.S.C. 5038(d)(2) is moved to a new subsection (e) of 18 U.S.C. 5038.

PART B—WIRETAP AMENDMENTS

1. General statement and present Federal law

Part B of title XII of S. 1762 amends the electronic surveillance provisions in current 18 U.S.C. 2510-2520—commonly referred to in this report as title III of the Omnibus Crime Control and Safe Streets Act of 1968[1]—to make a number of relatively minor changes in light of almost fifteen years of experience. To the extent that this Part deals with emergency interceptions in life endangering situations, it is similar to S. 1640 as reported by the Committee[2] and passed by the Senate by voice vote on March 25, 1982,[3] and Part B of title IX of S. 2572 as passed by the Senate by a vote of 95 to 1 on September 30, 1982.[4]

Under current title III, the Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Federal judge for an order authorizing the interception of wire or oral communications by Federal law enforcement officers as provided thereunder.[5] The same individuals are also authorized to specifically designate an investigative or law enforcement officer to conduct an emergency surveillance under the circumstance specified for such situations.[6] In 1974, the Supreme Court held that Congress intended that the official specifically designated by the statute must personally authorize law enforcement officers to make applications for wiretap orders.[7] The purpose of the statute as construed by the Court was to centralize in a publicly responsible official subject to the political process the formulation of law enforcement policy on use of electronic surveillance techniques.[8] This restriction provided in current law presents serious problems when the statutorily designated individuals—which as a practical matter are or should be limited to the Attorney General or the Assistant Attorney General for the Criminal Division—are not available for one reason or another.

With respect to emergency surveillances, title III currently permits emergency interceptions in situations which relate to "conspiratorial activities threatening the national security"[9] and "conspiratorial activities characteristic of organized crime."[10] In these situations, however, grounds must exist for obtaining a court order under title III, and an application for such an order must be made within 48 hours after the interception has occurred.[11] These exceptions have been invoked by the Attorney General in very few instances since the passage of title III, and these instances have usually involved serious threats to life.[12]

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[1] Public Law 90-351 (June 19, 1968).

[2] S. Rept. No. 97-319, 97th Cong., 1st Sess. (1982).

[3] 128 Cong. Rec. S2811-S2812 (daily ed.). A bill similar to S. 1640 was introduced in the 96th Congress by Senator Kennedy, S. 1717. Following hearings (*Wiretap Amendments,* Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, United States Senate, 96th Cong., 2d Sess. (1980) (hereinafter cited as Wiretap Hearings)), it was reported by the Committee (S. Rept. No. 96-788) and passed the Senate by voice vote on June 9, 1980 (126 Cong. Rec. (daily ed.)).

[4] 128 Cong. Rec. S12859, S12885 (daily ed.).

[5] 18 U.S.C. 2516.

[6] 18 U.S.C. 2518(7).

[7] *United States* v. *Giordano,* 416 U.S. 505 (1974).

[8] See *United States* v. *Martinez,* 588 F.2d 1227 (9th Cir. 1978).

In the past, when life-endangering situations have arisen, the Department of Justice and the Federal Bureau of Investigation have attempted to interpret the statutory exception relating to "conspiratorial activities characteristic of organized crime" as broadly as possible in order to save the life of the threatened victim or hostage,[13] but this was done "with some stretching, both of conscience and of statutory language."[14] While a legal argument could possibly be made that either the activities fell within the exception or that there was no legitimate expectation of privacy on the part of the criminal,[15] it was suggested that the statute should be amended to authorize such necessary investigative efforts. As stated by the Department of Justice:[16]

> In light of the exigency of those situations in which human life is threatened, there seems to be no reason why title III should omit a specific provision for emergency authorization in these instances. While we believe that in those relatively infrequent occasions in which emergency interceptions in life-endangering situations have been authorized by the Department, there has been a legal basis for such action, the statute is not as clear as it should be that life-endangering situations as a distinct category, are covered. Certainly, it should not be necessary to have to strain the present language to act in the interest of saving human life, by making a determination that the situation involves, e.g., "conspiratorial activities characteristic of organized crime." Title III, which in all other respects fully addresses in a straightforward manner those issues which may arise involving electronic surveillance, should speak clearly to authorize the use of emergency surveillance power in this most compelling situation.

Finally, while additions have been recommended in the past,[17] the current list of offenses with respect to which an electronic surveillance may be approved under title III does not include wire fraud (18 U.S.C. 1343), victim-witness intimidation (18 U.S.C. 1512 and 1513), those regarding the sexual exploitation of children (18

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[9] It is anticipated that many interceptions concerning national security matters would now be governed by the Foreign Intelligence Surveillance Act of 1978, 5 U.S.C. 1801-1811 (P.L. 95-911). See Wiretap Hearings, *supra* note 3 at 10 n. 6.

[10] 18 U.S.C. 2518(7)(a).

[11] 18 U.S.C. 2518(7).

[12] Wiretap Hearings, *supra* note 3 at 11, 95-96.

[13] Id. at 7, 14.

[14] Id. at 10.

[15] Id. at 6, 95-96.

[16] Id. at 10.

[17] See S. Rept. No. 97-319, *supra* note 1 at 16-17; Crime Control Act Hearings (statement of the Department of Justice, pp. 140-141).

U.S.C. 2251 and 2252), or monetary transactions reporting violations.[18]

2. Provisions of the bill, as reported

Section 1203 (a) and (c)(4) of the bill amend 18 U.S.C. 2518(7) (emergency surveillance) and 2516 (application to court for surveillance), respectively, to add the Deputy Attorney General and the Associate Attorney General to the specific statutory list of individuals within the Department of Justice authorized to approve applications to the courts for a surveillance order and to authorize an emergency surveillance. This permits a broader sharing of the burden for reviewing potential surveillance cases, thereby promoting a more thorough consideration without diminishing the congressional intent to have a politically responsible high official personally approve surveillance applications or emergency interceptions.

Section 1203(b) of the bill amends 18 U.S.C. 2518(7) to provide that a surveillance may be authorized without a court order in an emergency situation involving "immediate danger of death or serious physical injury to any person", if the other criteria for an emergency interception exists. The life-endangering exception is grounded in sound constitutional doctrine and Fourth Amendment case law.[19] It has been recommended by the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance [20] and endorsed by the last two Administrations, various Federal law enforcement agencies, and the American Bar Association,[21] and would have the effect of having title III which "is intended to cover the waterfront of electronic surveillance" [22] reflect current law and meet a demonstrated need. Since no one challenges the legality or importance of an exception in a life-endangering situation, title III should be amended to reflect clearly that this authority exists.

The type of situations intended to be included within this exception generally would relate to those involving the taking of a hostage, the kidnapping of a victim, or the planning of an execution.[23] These and similar situations involve serious and immediate threats to the life of innocent victims, and the use of electronic surveillance would focus more on the prevention of serious injury or death to that victim than it would on the collection of evidence which would be of secondary importance at the time. As one witness testified: [24]

> In addition to obtaining the evidence of a planned crime or crime in progress, the proposed provision would allow us to react immediately in a way to better assure the safety of the victim. For example, we could identify the

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[18] Compare 18 U.S.C. 2516(1)(a).

[19] *Warden* v. *Hayden*, 387 U.S. 294 (1967); see Wiretap Hearings, *supra* note 3 at 84–85.

[20] National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Electronic Surveillance, 15–16, 111–113 (1976) (officially cited as National Wiretap Commission Report).

[21] Wiretap Hearings, *supra* note 3 at 53–55; "ABA Standards Relating to the Administration of Criminal Justice: Electronic Surveillance," 2–5.2(i) (1978).

[22] Wiretap Hearings, *supra* note 3 at 7.

[23] Id. at 6–7, 14, 97.

[24] Id. at 14.

> kidnapper, the intentions of the kidnapper, the location of the victim, or better negotiate the safe release of hostages. The FBI could more effectively anticipate the subject's moves and be in a better position to resolve the crisis without loss of life. Such information would be acquired through a tap on a phone, a microphone secured in a house or in a getaway car.

A spokesman for the Department of Justice testified about past and future situations in which the need for such emergency authority was and would be necessary: [25]

> Situations have arisen and may arise in which terrorists or felons, while holding hostages, use an available telephone to arrange with associates a strategy to force action on their demands or a plan of escape. Similarly, there may be situations in which plans for an imminent murder are learned, but the location or identity of the victim is unknown or law enforcement authorities are otherwise unable to take measures to assure his safety. In such situations, the interception of communications may be necessary to protect the lives of the hostages or victims, yet time for obtaining a court order may not be available.

In preparation for hearings on the predecessor legislation, the Committee requested a number of Federal law enforcement agencies to review their investigative files for instances in which such emergency interception would have been a valuable investigative tool. Case studies were received from the Federal Bureau of Investigation [26] and the United States Secret Service [27] which underscored the critical need for this emergency exception.

Finally, section 1203(c) (1), (2), and (3) of the bill amend 18 U.S.C. 2516 to permit a title III surveillance for wire fraud, victim-witness intimidation, child pornography, and currency transactions offenses. With respect to wire fraud and child pornography cases, the Department of Justice recommended expansion of the listed crimes on the basis that: [28]

> [i]n the case of wire fraud, the offense itself consists of the use of wire communications to execute a fraudulent scheme. Thus, the failure of title III to permit the interception of such communications deprives Federal officers of the ability to obtain, in many cases, what is obviously the most compelling evidence of the offense. In light of the nature of the offense of wire fraud, it is in our view eminently sensible that title III should permit the interception of the very communications that constitute the offense. Indeed, it seems odd that title III presently permits the use of electronic interceptions to obtain evidence of bankruptcy fraud, but does not permit such interceptions in cases which directly involve the use of interstate or foreign wire communications to commit a fraud. This defect in

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[25] *Id.* at 10–11, 97.

[26] *Id.* at 17–19; see also S. Rept. No. 97–319, *supra* note 1 at 7 n. 37.

[27] Wiretap Hearings, *supra* note 3 at 47 n. 38.

[28] S. Rept. No. 97–319, *supra* note 1 at 16–17.

> current law was recognized and cured in S. 1630, the criminal code revision bill currently before the Senate.
>
> In 1978, the Congress enacted two new offenses, 18 U.S.C. 2251 and 2252, to address specifically the alarming problem of child pornography. These statutes make it a Federal offense, punishable by up to ten years' imprisonment, to use children in the production of films and photographs depicting sexual activities, as well as to distribute such materials. The Department of Justice has directed its investigators and prosecutors to give priority to these cases.
>
> Despite the emphasis we have placed on child pornography cases, prosecution of those who violate 18 U.S.C. 2251 or 2252 has been difficult. In cases involving the sexual exploitation of children, as is true with many other types of criminal offenses, the best means of investigating and prosecuting these violations would be through interviewing the victims and securing their testimony before grand juries, and ultimately, at trial. However, in child pornography cases, because of the age of the victims and the understandable reluctance of parents to permit their children's involvement in judicial proceedings regarding their sexual exploitation, pursuing these traditional methods which focus on the ability of the victim to provide substantial evidence concerning the offense is often not possible. Not only are the victims of child pornography often so youthful or so emotionally distressed as a result of their experiences that they cannot provide extensive information and testimony about their exploitation, but also, because of our responsibility to protect the interests of these child victims, we must at times decide against requiring them to recount in court the brutal degradation they have already experienced and to be subject to extensive cross examination.
>
> For these reasons, it would be extremely advantageous if 18 U.S.C. 2516 were amended to permit electronic interception when the underlying offense is a violation of 18 U.S.C. 2251 or 2252. Much of the business of child pornography takes place in offices and over the telephone. Being able to conduct electronic surveillance of such conversations would greatly enhance our ability to obtain convictions in this area. In addition, we are aware of the involvement of organized crime in these offenses, particularly in the distribution of child pornography, and title III has traditionally permitted the use of wiretaps to obtain evidence of offenses in which there is significant organized crime involvement.

The Committee concurs with the Department of Justice that the availability of title III surveillance for these offenses is justified.

The Committee also concurs with the Administration,[29] that electronic surveillance under a court order, if available, would improve the enforcement of the laws relating to currency and foreign transactions reporting and to victim-witness intimidation. The former is associated with organized crime and major illicit drug operations, while the latter is not only a fundamental protection for the effective operation of the criminal justice system but also a common occurrence in organized crime, drug trafficking, and serious violent crime cases.

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[29] See the Administration comprehensive crime proposal, S. 829, title XVI, Part B.

PART C—VENUE FOR THREAT OFFENSES

1. In general and present Federal law

Part C of title XII is designed to remove an unnecessarily restrictive choice of venue presently placed on the government in importation cases involving mailing or telephoning threatening communications and to clarify venue for certain importation cases. It is based on a provision in S. 1630, the Criminal Code Reform legislation approved by the Committee in the 97th Congress.[1]

Under 18 U.S.C. 3239, venue with respect to the offenses of transmitting in interstate or foreign commerce or mailing threats in violations of 18 U.S.C. 875, 876, or 877 lies only in the district where the threat was first placed in motion such as the district in which the letter was sent or in which the call was made. This statute is an exception to the general rule contained in 18 U.S.C. 3237 that an offense involving the use of the mails or transportation in interstate or foreign commerce is a continuing offense and may be prosecuted in any district from, through, or into which the commerce or mail matter moves.

2. Provisions of the bill, as reported

Part C repeals 18 U.S.C. 3239 so as to make the offenses in 18 U.S.C. 875–877 subject to the general rule of 18 U.S.C. 3237 and permit venue to lie in the district in which the threat was received as well as the district in which it was made. It is difficult to discern any reason to treat venue in threat cases differently from other continuing offenses, as a matter of right. For instance, there appears to be no reason to mandate that a defendant who mailed a threat be tried only where he mailed it, but to allow prosecution of a defendant who mailed an explosive in the district of mailing, the district of receipt, or any district through which it passed.

In addition, this Part amends 18 U.S.C. 3237 to add offenses involving the importation of a person or an object into the United States and thereby to classify such offenses as continuing offenses for which venue is appropriate in any district in which the imported object or person moves. This is designed to overcome the decision in *United States* v. *Lember,*[2] which limited venue in importation cases to the district of entry rather than of final destination. Such a construction is unjustified and would create difficulties since the witnesses are usually located in the place of destination. Moreover, the district of destination rather than first entry normally has the greater interest in vindicating the offense.

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[1] See section 3311 of S. 1630 and the discussion in S. Rept. No. 97-307, pp. 1139–1141.

[2] 319 F. Supp. 249 (E.D. Va. 1970). Other courts have rejected *Lember*. See *United States* v. *Godwin*, 546 F.2d 145 (5th Cir. 1977); *United States* v. *Jackson*, 482 F.2d 1167 (10th Cir. 1973), cert. denied, 414 U.S. 1159 (1974).

PART D—INJUNCTIONS AGAINST FRAUD

1. In general and present Federal law

Part D of title XII is designed to allow the Attorney General in appropriate cases to enjoin a violation of chapter 63 of title 18, United States Code, dealing with mail fraud, wire fraud, and, as amended by section 1108 of this bill, with bank fraud. A similar provision was contained in S. 1630, the Criminal Code Reform legislation approved by the Committee in the 97th Congress.[1]

During its early history, the English court of chancery issued injunctions to restrain the commission of certain criminal acts.[2] However, with the increasing stability of the English government, the need for the enforcement of the criminal laws by the chancelors diminished until by the end of the 15th century it had ceased entirely.[3] Thus, the rule became established under the common law that equity would not interfere by the issuance of an injunction to prevent the commission of crimes. Exceptions, however, soon developed to this general rule. Thus, if an act endangered property rights or was inimical to public health or safety, equity could enjoin such act regardless of whether the act was also made criminal by a statute.[4] Today it is generally conceded that a legislature has the authority to authorize the enforcement of a criminal statute by injunction.[5]

Congress has not, as a general practice, provided injunctive relief for the prevention of crimes about to take place. In certain fields, however, Congress has permitted the issuance of injunctions to restrain certain acts which may constitute criminal conduct or facilitate criminal conduct. Thus, injunctive relief has long been available for violation of the fraud provisions of the Securities and Exchange Act,[6] and these provisions have been used by the Securities and Exchange Commission on numerous occasions with excellent results. In the Organized Crime Control Act of 1970 [7] Congress authorized the issuance of injunctions and restraining orders in an effort to free interstate commerce from the corrupt control of organized crime. Similarly, the use of injunctions to prevent acts deemed detrimental to the economy is widespread in the antitrust field.

Another area where there is a great need for injunctive relief is in fraudulent scheme cases. While present law provides limited injunctive relief,[8] this relief is inadequate. First, the relief is restricted to the detention of incoming mail. It does not reach the situation where letters continue to be sent to further a scheme and remittances are collected personally from the customer or to fraudulent schemes which do not entail the use of the mails. Second, the required administrative proceedings entail considerable delay which is compounded by the extra time and energy necessary to bring an injunctive suit in the district court while the administrative proceedings are pending. Since the investigation of fraudulent schemes often takes months, if not years, before the case is ready for criminal prosecution, innocent people continue to be victimized while the investigation is in progress.

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[1] See section 4021 of that bill.

[2] Holdsworth. "A History of English Law" 405, 406 (7th ed. 1956).

[3] See Mack, The Revival of Criminal Equity, 16 Harv. L. Rev. 390, 391 (1903).

[4] Pomeroy, Equity Jurisdiction, p. 949 (5th ed. 1971).

[5] See Case Comments, Equity's Power to Enjoin Criminal Acts, 16 Wash. and Lee L. Rev. 303, 305 (1959).

[6] 15 U.S.C. 77t.

[7] 18 U.S.C. 1964.

[8] See 39 U.S.C. 3005(a).

Experience has shown that even after indictment or the obtaining of a conviction, the perpetrators of fraudulent schemes continue to victimize the public. For these reasons, the Committee has concluded that whenever it appears that a person is engaged or is about to engage in a criminal fraud offense proscribed by chapter 63, the Attorney General should be empowered to bring suit to enjoin the fraudulent acts or practices.

2. Provisions of the bill, as reported

Part D of title XII adds a new section, 1345, to title 18 to allow the Attorney General to put a speedy end to a fraud scheme by seeking an injunction in Federal district court whenever he determines he has received sufficient evidence of a violation of chapter 63 to initiate such an action. The court is to grant such action as is warranted to prevent a continuing and substantial injury to the class of persons designed to be protected by the criminal statute allegedly being violated. As a civil action, the proceeding is governed by the Federal Rules of Civil Procedure, except that if an indictment has been returned the more restrictive discovery provisions of the Federal Rules of Criminal Procedure apply.

PART E—GOVERNMENT APPEAL OF POST-CONVICTION NEW TRIAL ORDERS

1. In general and present Federal law

The purpose of part E is to create statutory authority for the government to appeal a decision of the district court to grant a new trial to a defendant following the entry of judgment or verdict of guilty. The proposal is identical to a provision in S. 1630, the Criminal Code Reform legislation approved by the Committee in the 97th Congress,[1] and was the subject of a separate Executive Communication to Congress during the present Session.[2] Currently, no appeal lies from an erroneous post-conviction ruling awarding a defendant a new trial, although such an appeal would not violate constitutional rights. Permitting an appeal is consistent with the purposes of the 1970 statute revising the Criminal Appeals Act, 18 U.S.C. 3731, and would provide a far fairer and more efficient mechanism to correct an erroneous decision than a costly, time-consuming new trial, the only alternative under present law.

Prior to 1970, the right of the United States to appeal trial court errors in criminal cases was severely restricted. Not only were the parameters of appellate jurisdiction under the then applicable Criminal Appeals Act unjustifiably narrow, the government's opportunities to obtain appellate review under the Act were further constrained by the Act's reliance on arcane common law distinctions that had no analogue in modern Federal practice. By 1970, the Supreme Court had come to characterize the Act as a "failure."[3]

Recognizing that the Criminal Appeals Act virtually precluded any government appeal of erroneous decisions in criminal cases and thus frequently stood as a bar to the rational and effective enforcement of our criminal laws, the Congress in 1970 amended 18 U.S.C. 3731, the statute governing appeals by the United States in criminal cases, to give the government the broadest authority permitted under the Constitution to appeal a trial court's dismissal of an indictment or information. In order to emphasize its intention that the new statute was to be a marked departure from the former Criminal Appeals Act, the Congress specifically included in the new language of 18 U.S.C. 3731 the admonition that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."

While, as has been noted by the Supreme Court, it was the intent of the Congress in its 1970 amendment of 18 U.S.C. 3731 "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit,"[4] the 1970 amendment neglected, in one important area, to correct the then prevailing unwarranted restrictions on government appeals. The area left unremedied, as reflected in consistent decisions denying the government a right to appeal, was with respect to erroneous post-conviction orders for a new trial.[5]

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[1] See section 3724 of that bill and the discussion in S. Rept. No. 97-307, p. 1223.

[2] Executive Communication #328, February 10, 1983, suggesting the legislation embodied in part E.

[3] *United States* v. *Sission*, 399 U.S. 267, 307 (1970).

The present gap in the appellate jurisdiction conferred by 18 U.S.C. 3731 which prohibits review of post-conviction erroneously granted new trial orders is wasteful of resources and harmful to the government. Since the government has no opportunity to obtain correction of a wrongly entered post-conviction new trial order, all such cases must be retried at considerable public expense and further burdening our overcrowded courts. Moreover, the likelihood of the government's prevailing again at a second trial is necessarily diminished for reasons unrelated to the guilt or innocence of the defendant, for the strategy of the prosecution will have already been revealed and with the passage of time government witnesses may have become unavailable or their memories dimmed. In recent years, the government's inability to seek review of post-conviction new trial orders has been responsible for the government's ultimately losing an increasing number of cases in which it had originally obtained a conviction. Thus, in the Committee's view, there is substantial reason to extend the broad authority for appellate redress of trial court errors now set out in 18 U.S.C. 3731 to the context of post-conviction new trial orders. Indeed, such an amendment is fully consistent with the present purposes of the statute.

The compelling need for appellate review of orders granting a criminal defendant a new trial was well illustrated in Judge Mansfield's concurrence in *United States* v. *Sam Goody, Inc.*, 675 F.2d 17 (2d Cir. 1982), in which a new trial was granted to the defendants convicted following a one-month trial on charges of criminal copyright infringement and interstate transportation of stolen property. Although Judge Mansfield found that the trial judge had "grossly abused his discretion in granting a new trial," he was constrained to agree with the majority that there was no authority for the court to entertain an appeal of the new trial order. He emphasized, however, that this result worked a "grave injustice":[6]

> The effect of the district court's order is to deprive the public of a fairly-won and fully supported conviction.
>
> * * * * *
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> Should the government be unable, because of the passage of time or lack of prosecutorial resources to reassemble all the proof for a long and expensive retrial, the guilty appellants will go scot-free.

Judge Mansfield further noted:[7]

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[4] *United States* v. *Wilson*, 420 U.S. 332, 337 (1975).

[5] See, *e.g.*, *United States* v. *Alberti*, 568 F.2d 617 (2nd Cir. 1977); *United States* v. *Taylor*, 544 F.2d 347 (8th Cir. 1976).

[6] 675 F.2d at 27.

[7] *Id.* at 28.

> The ironic part is that if the trial judge had only *dismissed* the counts of which appellants were found guilty rather than grant a new trial, the government would be entitled to appeal as of right under 18 U.S.C. 3731 and the dismissal would be reversed, leaving the verdicts of guilty to stand and avoiding the waste of another long trial.

The absence of express authority to appeal new trial orders under 18 U.S.C. 3731 leaves only one possible avenue for the government to obtain review of erroneous grants of new trials in criminal cases, and that is through a petition for a writ of mandamus vacating the new trial order and reinstating the judgment or verdict of conviction. However, the writ of mandamus is an extraordinary remedy and will not be embraced by the courts as a substitute for appellate review. As such, its availability as a means of addressing the current gap in appellate jurisdiction over new trial orders is extremely limited.[8]

The difficult position of the government in seeking correction of a new trial order by way of a mandamus petition was illustrated in *In re United States.*[9] The District Court's new trial order, following the conviction after a three and one-half week trial before a sequestered jury of defendants Antonelli and Yeldell on charges of conspiracy to defraud the District of Columbia and bribery, was based on the failure of a single juror during voir dire to reveal what the defendants asserted was prejudicial information about the nature of her father's employment. In denying the mandamus petition, the court dismissed the government's contention that the trial court was grievously in error in assessing the impact of the juror's answer on the essential fairness of the trail, as simply "beside the point, for this is a petition for mandamus."[10] The new trial order, even if it constituted a substantial error, could not be corrected by mandamus as long as its entry was within the trial court's jurisdiction. At a second trial, both defendants were acquitted.

Providing for a post-conviction right of appeal from a district court order awarding a new trial would violate no constitutional guarantee. In *United States* v. *Wilson,*[11] the Supreme Court held that "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended,"[12] and thus, "when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause."[13] Therefore, it is clear that to authorize appeal of a post-conviction new trial order is constitutionally permissible, since a successful government appeal would merely result, as in *Wilson,* in the reinstatement of the conviction, not a second trial. Indeed, not providing for such an appeal creates an anomaly: as noted by Judge Mansfield in the *Sam Goody* case, *supra,* if a judge following a verdict of guilty enters an order for dismissal of the indictment or acquittal (i.e. judgment n.o.v.), the government may presently appeal under 18 U.S.C. 3731 and have the verdict reinstated;[14] but if the judge awards the lesser relief of a new trial, no appeal is possible and a second trial is the only recourse.

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[8] See, e.g., *Will* v. *United States,* 389 U.S.C. 90 (1967).

[9] 598 F.2d 233 (D.C. Cir. 1979).

[10] *Id.* at 236.

[11] 420 U.S. 332 (1975).

[12] *Id.* at 344.

[13] *Id.* at 352-353.

2. Provisions of the bill, as reported

The bill accomplishes the goal of conferring authority on the United States to appeal from a post-conviction new trial order by amending present 18 U.S.C. 3731 to add the phrase "or granting a new trial after verdict or judgment" following the words "indictment or information". This extends the ambit of the statute to orders granting a new trial after conviction.

The Committee is aware that only a small fraction of post-conviction orders for a new trial will involve legal error warranting appeal. Because of the prevailing requirement for prior authorization by the Solicitor General of all government appeals,[15] the Committee does not anticipate that the modest enlargement of 18 U.S.C. 3731 proposed here will give rise to problems. On the contrary, as a result of the careful screening process within the Solicitor General's Office and the ensuing high incidence of successful appeals under the government appeals statute today, it is probable, in the Committee's view, that allowing appeals from unwarranted district court rulings requiring retrials will produce a significant new saving of judicial and prosecutive time and resources.

In sum, there is a pressing need for the amendment to 18 U.S.C. 3731 set forth in Part E of title XII authorizing government appeals of post-conviction new trial orders. The United States' present inability to seek correction of erroneous new trial orders is justified by neither constitutional principles nor policy considerations and is clearly contrary to the interests of justice. At best, this situation requires the expense of unwarranted new trials. At worst, because of the inevitable disadvantage to the government in having to proceed with a second trial, it affords properly convicted defendants an opportunity for an unjustified acquittal.

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[14] See, *United States* v. *Martin Line Supply Co.*, 430 U.S. 564, 568, 570 (1977); *United States* v. *Wilson, supra note 11.*

[15] 28 C.F.R. 0.21(b).

PART F—WITNESS SECURITY PROGRAM IMPROVEMENTS

1. In general and present Federal law

This subchapter codifies and revises the provisions on relocation of witnesses enacted as title V of the Organized Crime Control Act of 1970. That title was not enacted as part of title 18 and presently appears in headnote fashion in chapter 223 of title 18 just preceding 18 U.S.C. 3481. The Committee has included this Part to bring the provisions of title V of the 1970 Act into the title 18 chapter dealing with ancillary investigative authority where it logically belongs. The provisions of Part F continue the basic theory behind title V of the Organized Crime Control Act of 1970—insuring that witnesses in organized crime cases are produced alive and unintimidated before grand juries and at trial. The Committee endorses the statement on title V that appeared in the Senate Report on S. 30, the bill which became the Organized Crime Control Act of 1970,[1] as follows: [2]

> Each step in the evidence gathering process * * * moves toward the production of live testimony, testimony that is necessary to bring criminal sanctions into play in the fight against organized crime. Criminal sanctions, in short, do not enforce themselves. Obtaining testimony, however, is only part of the problem. The Attorney General testified in 1965 that even after cases had been developed, it was necessary to forego prosecution hundreds of times because key witnesses would not testify for fear of being murdered. Tampering with witnesses is one of organized crime's most effective counter weapons. Indeed, the Attorney General indicated that such fear was not unjustified; he testified that the Department, in its organized crime program, lost more than 25 informants between 1961 and 1965. It was in this context, therefore, that the President's Crime Commission tragically concluded:
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> No jurisdiction has made adequate provision for protecting witnesses in organized crime cases from reprisal. In a few instances where guards are provided, resources require their withdrawal shortly after the particular trial terminates. On a case-to-case basis, governments have helped witnesses find jobs in other sections of the country or have even helped them to emigrate. The difficulty of obtaining witnesses because of the fear of reprisal could be countered somewhat if governments had established systems for protecting cooperative witnesses.

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[1] Public Law 91-452, 84 Stat. 933.

[2] S. Rept. No. 91-617, 91st Cong., 1st Sess., pp. 59-60. (1969).

> The Federal Government should establish residential facilities for the protection of witnessess desiring such assistance during the pendency of organized crime litigation.
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> After trial, the witness should be permitted to remain at the facility so long as he needs to be protected.

The Committee has concluded that twelve years of experience with witness protection under the 1970 Act has amply proven both the necessity and utility of such provisions. It is a recognized fact that testifying in organized crime or narcotics cases involves a real danger of violent retaliation. Protection by means of relocation to a safe environment is often necessary in such cases. Indeed, the ability to offer protection to witnesses is virtually a requirement of an effective campaign against organized crime. In addition, the Committee has concluded that in appropriate situations protection should be provided in cases that do not involve organized crime activity but do involve serious criminal violations and a very real presence of danger to witnesses and informants.

The Committee has further concluded that the language used in title V of the 1970 Act may be inadequate to describe what is necessary to effectively relocate endangered witnesses and to ensure their security. Under the current language of title V to provide "protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses," for example, the Attorney General has been called upon to develop special procedures and techniques of protection and relocation. These techniques and procedures are given greater statutory recognition in this bill. The Committee, however, believes that setting out these techniques and procedures in the Code is not a new grant of authority, but is rather a recognition of the current program and a reaffirmation that these techniques and procedures are fully justified and well within the contemplation of title V of the 1970 Act.

2. Provisions of the bill, as reported

Part F proposes to create a new chapter, 224, of title 18, United States Code, consisting of three sections, 3521, 3522, and 3524.[3] These sections will be discussed in sequence.

SECTION 3521. WITNESS RELOCATION AND PROTECTION

Section 3521 continues the current law authority of the Attorney General to provide protection and security by means of relocation for witnesses and their immediate families in proceedings brought against persons involved in criminal activity. Several changes have been made.

First, under current law the protection may be offered where the proceedings have been instituted against a person alleged to have participated in an "organized crime activity". The Committee feels that the term "organized crime activity" is, on the one hand, too vague in that it fails to give sufficient guidance to the Attorney General in the implementation of this statute, and is, on the other hand, too restrictive of the Attorney General's authority to afford protection where it is otherwise warranted. Accordingly, the Committee has substituted a more precise term. Under section 3521, witness protection may be provided in an official proceeding if the Attorney General determines that an offense described in section 1512 (Tampering with a Witness, Victim, or an Informant) or 1513 (retaliating against a Witness or an Informant) or a similar State or local offense involving a crime of violence directed at a witness, is likely to be committed.

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[3] A fourth section, 3523, was originally included which dealt with a civil action to restrain witness or victim intimidation. That provision (which had been proposed initially in section 4014 of S. 1630, as reported in the 97th Congress), was enacted in substance in the 97th Congress as 18 U.S.C. 1514, part of the Victim and Witness Protection Act of 1982, Public Law 97-291.

The reference to sections 1512 and 1513 [4] insures completeness of coverage. Clearly, the offenses set forth in those sections are precisely the type of conduct against which this subchapter seeks to afford protection for witnesses, potential witnesses, victims, and their immediate families. The Committee intends by reference to these two sections to describe the kind of conduct which must be protected against. In addition, the section makes clear that there is no intent to limit protection to Federal offenses. The Attorney General can order protection of State or local witnesses on a reimbursable basis. Similarly there is no intent to restrict protection to organized crime activities. There is no reason to deny protection to a witness who is in danger of retaliation, simply because the nexus between the offense and organized criminal activity is lacking. For instance, a rape victim fearing retaliation from her assailant may not be willing to testify unless relocation or protection is made available. That a further assault will subject the attacker to further prosecution is cold comfort in such a situation. Protection or relocation should be available in such a circumstance. Extending witness protection in this manner should not create a burden on the Department or the witness relocation program, first because any State victims are to be protected subject to reimbursement of the Federal Government by the State, and second because the Attorney General retains discretion as to any individual victim being afforded protection.

The Committee also has substituted the term "official proceeding" for the current law term "legal proceedings." This change is not intended to limit the reach of the current language. In particular, the Committee intends that the statute remain applicable in civil and administrative proceedings, where warranted, as well as in criminal proceedings. The term "official proceeding" is intended to achieve this result. In addition the word "involving" is used instead of the more limited word "instituted" to make it clear that relocation is possible prior to formal charges being brought against a specific defendant.

In addition, relocation and protection may be offered not only to the witness or a potential witness and to the immediate family of such witness but "to a person otherwise closely associated" with the witness. Experience has shown that the danger of retaliation is not always confined solely to the witness and his immediate family. Protection has to be afforded occasionally to the fiance of a witness, to children of the fiance, and to others closely associated with the witness. The phrase "a person otherwise closely associated" is intended to recognize this need. The standard that must be applied before protection and relocation will be afforded to a family member or a person closely associated with the witness is that such person may also be endangered.

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[4] These sections were enacted as part of the Victim and Witness Protection Act of 1982 (see Public Law 97-291).

Section 3521(b) spells out in more detail the protective measures that the Attorney General may take to ensure witness protection or relocation. The general concept is that protection of the witness will be achieved either through relocation and the establishment of a new identity or through whatever means the Attorney General deems necessary and adequate short of relocation. This can mean as little as putting someone in a motel outside of town until the trial is over, or it could include the full panoply of procedures listed in section 3521(b).

The procedures developed by the Attorney General to implement section 3521(b) must be designed to protect the health, safety, and welfare of the person to be protected from bodily danger. The Attorney General is afforded wide latitude in taking any action he deems necessary to achieve this result, and he can continue such action for so long as, in his judgment, the danger continues. To guide the exercise of his discretion, the Committee has outlined six measures that may be involved in any relocation. The list in section 3521(b), however, is not intended to be all-inclusive and for the most part reflects procedures already developed to implement the current statute.

First, the Attorney General is authorized to provide suitable official documents to enable the person relocated or protected to establish a new identity without having to reveal his prior identity.[5] Such documentation may include such items as birth certificates, drivers licenses, social security cards, military records, school records, medical records, and the like. It is expected that new names will, in most instances, be legitimized ultimately by court approved name changes. The Committee is aware of the cooperation afforded to the existing program by many Federal, State, and local governmental agencies in this regard and urges that such cooperation and assistance be maintained in the future.

Second, the Attorney General is authorized to provide housing for the protected or relocated persons and, third, for transportation of persons and property to the new resident. In this regard the Attorney General may assist in the selection and location of a new residence and the paymnent of moving expenses, and may render such other assistance as may be necessary to effect the relocation.

Fourth, the Attorney General is granted authority to provide a tax free subsistence payment in a sum to be established by him in regulations. This provision is in recognition of the need to provide funds for living expenses to a witness and his family who are suddenly removed from their existing life and employment. The subsistence amount and length of payment will vary from witness to witness, but it is not intended that it be paid for a great length of time. It is a stop-gap measure until the relocated family can become established and self-sufficient. There is no requirement that the Attorney General continue such payments beyond the length of time he deems sufficient in the individual case for the relocated witness to be able to fully support himself. This payment is in no way to be a substitute welfare system. In this regard, the Committee notes with approval the existing Department of Justice efforts to limit the duration of such payments. This payment is also not intended to relieve the investigative agencies of any authority or responsibility that they may have to pay informants from time to time.

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[5] 18 U.S.C. 1028, the general false identification statute, is made expressly inapplicable to authorized witness protection activities, in recognition of the importance of the need in some cases to supply relocated or protected persons with new identities.

Fifth, the Attorney General is authorized to assist the person relocated in procuring employment. Here the obligation is to assist in finding job opportunities; however, the primary obligation in finding new employment rests with the relocated witness. Accordingly, there is no guarantee of a job contemplated and the responsibility does not hold for finding future employment in later years.

Sixth, the Attorney General is authorized, in his discretion, to refuse to disclose to anyone the identity, location, or any other matter concerning the person relocated or protected or the program. Obviously, the success of a witness protection and relocation program depends on assured security as to its details. There is no point in relocating a witness with a new identity if that identity will be made public. In exercising his discretion to maintain the secrecy of the program, the Attorney General is to be guided by certain factors. These are the danger to the life and safety of the person relocated or protected, the security of the program itself, and the benefit that would accrue from such disclosure to the public or to the person seeking the disclosure.[6]

Subsection (c) deals with the occasional but vexing problem of a citizen who has a civil cause of action against a protected person who is stymied in his efforts to litigate because he cannot learn the new identity or whereabouts of the potential defendant. Under subsection (b)(6) disclosure of such information for the purpose of serving process would generally be forbidden. It is not the intent of the witness relocation and protection program to deprive otherwise innocent persons of their right to litigate civil claims for damages; however, a balance must be struck to ensure protection of the witness. Subsection (c) seeks to strike such a balance. It authorizes the Attorney General to accept the service of process on a protected person named as a defendant in a civil cause of action ensuing prior to the person's relocation. The Attorney General is required to make reasonable efforts to serve a copy of the process on the relocated person at his last known address. If a judgment is entered against the relocated person the Attorney General must determine if the person has made reasonable efforts to comply with the provisions of the judgment, and, if the person can still be located, the Attorney General is required to take affirmative steps to urge compliance by the protected person with the judgment. If the Attorney General determines that the person has failed to make reasonable efforts to comply with the judgment, he is granted discretion to reveal the identity and locations of the person to the plaintiff, after giving appropriate weight to the danger to the protected person that will be caused. Such disclosure to the plaintiff must be made upon the express condition that the plaintiff will not use that information for any purpose other than for disclosures that are essential for recovery under the judgment. Finally, the subsection provides that any disclosure or nondisclosure of the identity or location of the protected person by the Attorney General is not to subject the government to liability in any action based on the consequences of such discolosure.

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[6] As drafted section 3521(b)(6) should be read as a statute permitting the denial of information under 5 U.S.C. 552(b)(3), as amended, of the Freedom of Information Act. Other exemptions under the Act may apply as well.

The Committee is aware of and generally approves the procedures implemented by the Department which provide for the disclosure of criminal histories of protected persons made pursuant to requests by various law enforcement agencies.

SECTION 3522. REIMBURSEMENT OF EXPENSES

This section continues the existing authority of the Attorney General to provide transportation, housing, subsistence, or other assistance for a witness or other person pursuant to section 3521 to State or local governments conditioned, in his discretion, upon reimbursement of all or part of the costs involved.

SECTION 3524. DEFINITION FOR SUBCHAPTER D

This section contains a definition of "government" for subchapter D. It is defined to make it clear that the term includes both a State and local government as well as the Federal Government. This definition conforms to that contained in current law.

PART G—CLARIFICATION OF CHANGE OF VENUE FOR CERTAIN TAX OFFENSES

1. In general

Part G would amend section 3237(b) of 18 U.S.C. to clarify the conditions under which a transfer of venue may be granted in connection with certain tax prosecutions.

2. Present Federal law

The general venue provision for the prosecution of Federal offenses committed in more than one district is 18 U.S.C. 3237(a). Except as otherwise provided by law, a Federal offense may be prosecuted in any judicial district where the offense was begun, continued or completed. An offense involving use of the mails, or transportation in interstate or foreign commerce, is a continuing offense which may be prosecuted in any judicial district from, through, or into which the mail or commerce moves.

Section 3237(b) modifies the general venue provisions of section 3237(a) in cases where a prosecution is instituted for violation of certain specific tax statutes (26 U.S.C. 7201 and 7206 (1), (2) or (5)), the offense involves use of the mails, and the prosecution is commenced in a district other than the district in which defendant resides. In such cases, the defendant may file a motion within 20 days after arraignment electing to be tried in the district in which he was residing at the time the alleged offense was committed. The Courts of Appeal for the Second Circuit[1] and the Fourth Circuit[2] have held that the transfer of venue election is available only when venue in the district of prosecution is dependent on the use of the mails. The Court of Appeals for the Ninth Circuit[3] and several district courts have held, on the other hand, that when the mails are used as part of the offense, the election to transfer the prosecution is available even though venue is not based on the mailing.

3. Provisions of the bill, as reported

The bill would clarify language contained in Section 3237(b) relating to use of the mails, which has been the subject of differing interpretations by the courts. The transfer of venue option was enacted to provide a defendant with a shield against having to defend a tax prosecution far from his residence where the place of prosecution is based solely on a mailing to a distant office of the Internal Revenue Service. It was not intended to be a sword permitting transfer on the election of the defendant in cases where the prosecutor seeks to establish venue wholly apart from the receipt by the Internal Revenue Service of materials transmitted by mail.

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[1] *In re United States (Clemente)*, 608 F.2d 76 (2d Cir. 1979), cert. denied, 446 U.S. 908 (1980).

[2] *In re Petition of the United States (Nardone)*, 706 F.2d 494 (4th Cir. 1983).

[3] *United States* v. *United States District Court (Solomon)*, 693 F.2d 68 (9th Cir. 1982).

The Committee endorses the view of the Second Circuit[4] and the Fourth Circuit[5] that section 3237(b) has no application in situations where venue is predicated on facts independent of any mailing. The bill would clarify section 3237(b) by providing expressly that a transfer of venue is required only when the sole basis for venue in a particular district is the receipt by the Internal Revenue Service of mailed materials.

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[4] *In re United States (Clemente), supra* note 1.

[5] *In re Petition of the United States (Nardone), supra* note 2.

PART H—18 U.S.C. 951 AMENDMENTS

1. Present Federal law

Under 18 U.S.C. 951, non-diplomatic foreign agents are required to notify the Secretary of State of their intention to act on behalf of foreign governments. Those who fail to do so are subject to a prison term of not more than ten years or a fine of not more than $75,000 or both. Though this statutory requirement dates back to 1917, the Department of State has never promulgated regulations nor formalized the procedures governing notification. The present statute sometimes places the Department in an awkward relationship to the representatives of foreign governments with whom the Department routinely does business. The present Act, therefore, can impede our foreign relations.

2. Provisions of the bill, as reported

The amendment is identical, except for the fine provision of the earlier bill, to a provision that passed the Senate in the 97th Congress as part of H.R. 7154. The amendment transfers the responsibility for administering the statute to the Department of Justice, which presently administers the Foreign Agent Registration Act (22 U.S.C. 611-624), but requires the Attorney General to keep the Department of State informed about the notifications received. The Attorney General is directed to promulgate rules and regulations governing notification. The proposed Act is not intended to cover those individuals engaged in routine commercial matters but is intended to cover individuals who represent foreign governments in political activities that may or may not come within the scope of the Foreign Agent Registration Act. By excluding from the notification requirement several classes of individuals who are presently covered, the proposal also limits the coverage of the statute by focussing only on those in whom the United States Government has a necessary interest.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 7, 1983.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, 224 Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 1762, the Comprehensive Crime Control Act of 1983.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RUDOLPH G. PENNER, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 1762.

2. Bill title: Comprehensive Crime Control Act of 1983.

3. Bill status: As reported by the Senate Committee on the Judiciary, August 4, 1983.

4. Bill purpose: The Comprehensive Crime Control Act of 1983 would amend title 18 of the United States Code by revising Federal criminal law, reorganizing administrative procedures and civil proceedings, and changing terms of imprisonment and fines. Some new offense categories are specified and certain existing offenses are redefined. The bill also allows the detention of defendants believed to present a danger to the community and requires additional prison time for individuals who commit offenses while on release. In addition, a United States Sentencing Commission is created for the purpose of establishing sentencing policy guidelines. Authorizations are also provided for a number of new and existing programs within the Office of Justice Assistance.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1984	1985	1986	1987	1988
Estimated authorization level	96	126	137	146	94
Estimated outlays	50	107	130	143	143

This estimate does not include the costs of the formula and discretionary grants authorized under title VI of the bill, because no specific authorizations are provided, and because CBO has no basis for projecting the scope of the program. Also, while the net cost of the bill would be reduced by substantially increased fine and forfeiture receipts, these increased collections cannot be estimated on the basis of available data and are therefore not included in the figures above. The costs of this bill fall within budget functions 750 and 800.

Basis of estimates.—For purposes of this estimate, it is assumed that the bill will be enacted by September 30, 1983, and that all provisions contained in the bill, except for certain sections of title II, will become effective October 1, 1983. The establishment of a Sentencing Commission and the repeal of the Youth Corrections Act are assumed to take effect October 1, 1983, while the remainder of title II is assumed to take effect two years later, as specified by the bill.

It is also assumed that any increase in detention or incarceration will be absorbed by existing Federal facilities, or by the use of State and local facilities to imprison Federal offenders. While any increase in detention and incarceration will impose further burdens on Federal, State, and local correctional facilities, and may, in the long term, contribute to the need for new facilities, there is no basis for relating the effects of this bill, by itself, to the need for future prison construction.

Title I—Bail reform.—This title amends the Bail Reform Act of 1966 to permit Federal judges to take into consideration a defendant's danger to the community in setting pretrial release conditions, to permit pretrial and presentence detention of certain individuals, and to alter the structure of sanctions for violators of release conditions. Enactment of this title would raise Federal expenditures by increasing the number of days spent by defendants in pretrial, presentence, and postsentence detention. The mandatory additional sentence for those individuals convicted of an offense while on release is also expected to result in increased Federal costs. The estimated costs of title I are summarized in the following table.

ESTIMATED BUDGET IMPACT—BAIL REFORM

[By fiscal years, in millions of dollars]

	1984	1985	1986	1987	1988
Estimated authorization level	16	41	48	50	52
Estimated outlays	15	38	47	50	52

Title I is virtually identical to S. 215, as ordered reported by the Senate Committee on the Judiciary on May 10, 1983. CBO prepared a cost estimate for that bill on May 24, 1983. The above estimate is similar to the one for S. 215, but reflects an assumed enactment date of October 1, 1983, rather than the July 1, 1983 date used for S. 215.

Title II—Sentencing reform.—Title II is identical to S. 668, the Sentencing Reform Act of 1983, as reported by the Senate Committee on the Judiciary, August 4, 1983. This title establishes a United States Sentencing Commission as an independent agency within the executive branch. The Commission is to have seven voting members appointed by the President, with the advice and consent of the Senate, and one permanent nonvoting ex-officio member (the Attorney General or his designee). The Administrative Office of the United States Courts estimates that the Commission will require approximately 130 additional full-time staff, computer facilities, and resources for the training of judges, magistrates, and probation officers. The estimated costs of the Commission, based on data provided by the Office, total $5 million in 1984, $8 million in 1985, and between $6 million and $7 million in subsequent years.

Title II also amends those sections of law governing the preparation of presentence reports. Presentence reports are currently prepared in abour 85 percent of the cases appearing before a judge. The bill would have the effect of requiring a presentence report on virtually every offender. The additional cost to the government of this provision is estimated to be about $2 million annually, beginning in fiscal year 1986.

This title raises the maximum limitation on fines to $250,000 for an individual and $500,000 for an organization. (The maximum fine for a felony is currently $10,000.) It is not possible to estimate the additional revenues that will be generated from increased fines, however, since there is no basis for predicting how the new ceilings will affect the amount of fines levied or collected. Nevertheless, the increased revenue is likely to be substantial, because the new limits are much higher than under current law, and because the bill strengthens collection procedures.

The cap on payments to prisoners upon release is raised from $100 to $500 by the title. This would not necessarily increase total expenditures for release payments, however, since the size of the payments is determined by the Bureau of Prisons. If the number of prisoners receiving release payments in future years is the same as in 1982 (10,576 prisoners), and if each receives the new maximum of $500, the total increase in Federal expenditures would be about $4 million to $5 million annually. However, since many prisoners do not receive the maximum payment, even under the current limit, any increase in costs is likely to be much smaller.

The estimated costs of title II are summarized in the table below. The figures in the table do not reflect increased revenues resulting from the higher fine levels or the increased outlays resulting from the higher prisoner allotment cap, since both are subject to discretionary action and cannot be reliably estimated at the present time.

ESTIMATED BUDGET IMPACT—SENTENCING REFORM

[By fiscal years, in millions of dollars]

	1984	1985	1986	1987	1988
Estimated authorization level	5	8	8	8	9
Estimated outlays	5	8	8	8	9

Title III—Forfeiture.—Title III is identical to S. 948, the Comprehensive Criminal Forfeiture Act of 1983, as reported by the Senate Committee on the Judiciary, August 4, 1983. This title is intended to make it easier for the Federal Government to require the forfeiture of property utilized in or obtained through racketeering and major drug-related crimes. However, CBO has no basis for estimating the increased proceeds that might result from this title, because the amount of money associated with criminal activities for which forfeiture is prescribed is unknown, and because it is impossible to predict the success of government prosecutions and investigations. Information provided by the Department of Justice indicates that forfeiture proceeds could increase by tens of millions of dollars as a result of the bill. Similarly, CBO has no basis for estimating the change in the cost to the government of processing forfeiting property, since it is impossible to predict the type and volume of property that will be seized under forfeiture laws. Finally, the two special forfeiture funds established by this title are not expected to have any net effect on the Federal budget.

Title IV—Insanity defense.—Title IV revises provisions of the United States Code and the Federal Rules of Criminal Procedure regarding offenders who are or have been suffering from a mental disease or defect. The title addresses the procedures to be followed in Federal courts in determining the mental competency of a defendant to stand trial and the existence of insanity at the time of the offense. It also provides for the hospitalization of defendants possessing a mental disease or defect and limits the use of the insanity defense. Based on information provided by the Department of Justice, CBO does not expect this title to have any significant budgetary effect.

Title V—Drug enforcement amendments.—The purpose of this title is to provide a more rational penalty structure for major drug trafficking offenses. Part A establishes more severe penalties for trafficking in a higher quantity of drugs, raises fine levels for drug offenses, and eliminates the distinction between narcotics and certain other drugs for purposes of sentencing. Part B gives the Attorney General new emergency authority to place an uncontrolled substance under temporary control, alters the registration requirements for pharmacies and pharmacists, and provides special grant authority for expansion of the Drug Enforcement Agency's (DEA) State assistance program. Although the grant authority for the State assistance program could have a significant budgetary effect, CBO has no basis for estimating the additional expenditures resulting from the program, because the bill does not specify an authorization level, and because there are no existing data on similar programs.

Title VI—Justice assistance.—Title VI is virtually identical to S. 53, the Justice Assistance Act of 1983, as ordered reported by the Senate Committee on the Judiciary, June 16, 1983. (CBO prepared a cost estimate for that bill on July 1, 1983.) Title VI amends the Omnibus Crime Control Act of 1968 by reauthorizing a number of existing criminal justice grant programs and by providing authorizations for several new programs within the Office of Justice Assistance for fiscal years 1984 through 1987. Except for the new Office of Criminal Justice Facilities, no specific authorizations are contained in the title; rather, such sums as may be necessary are authorized to be appropriated. This title also eliminates the authorization for the Office of Community Anti-Crime Programs.

The estimated budget impact of the authorization in this title is summarized below. The estimates do not include amounts for formula and discretionary grants to State and local governments, because no specific sums are authorized for the program, and because there is no basis for projecting the scope of the program. The estimated authorization levels for the National Institute of Justice and the Bureau of Justice Statistics represent the levels of funding necessary to maintain 1983 program levels in future years. Also, CBO assumes the appropriation of the full $25 million authorization for the Office of Criminal Justice Facilities. Estimated outlays are based on historical spending patterns for similar Federal programs.

ESTIMATED BUDGET IMPACT—JUSTICE ASSISTANCE

[By fiscal years, in millions of dollars]

	1984	1985	1986	1987	1988
Estimated authorization level	66	68	70	73	1
Estimated outlays	21	52	64	70	52

Title VII—Surplus property amendments.—Title VII provides for the donation of surplus property to any State or locality for use as a correctional facility. Based on information provided by the Bureau of Prisons and the General Services Administration (GSA), it is estimated that $30 million to $50 million in receipts would be forgone in the first five years after enactment of this bill. This estimate assumes that if the bill is enacted, properties currently identified by the Bureau of Prisons as having a potential for donation as correctional facilities would be donated to State and local governments. It is also assumed that all property with the potential to be donated would be sold if the bill is not enacted. For the purpose of this estimate, it is projected that about $8 million per year in receipts would be lost as a result of this title.

Title VIII—Labor racketeering amendments.—Title VIII raises fines and prison sentences for people attempting to buy or sell labor peace, and clarifies the jurisdiction of Federal district courts in Taft-Hartley Act cases. The title also strengthens the provisions of law prohibiting individuals convicted of certain crimes from serving as labor officials or as decision-makers for an employee benefit plan. Enactment of this title is not expected to have any significant budgetary effect.

Title IX—Foreign currency transactions.—This title strengthens the power of law enforcement authorities to stem the illicit flow of currency involved in narcotics trafficking and in the laundering schemes of organized crime. Title IX increases the penalties for failing to report the importation and exportation of currency, makes it easier for the police to arrest a suspect before he leaves the United States, authorizes the payment of awards to informants, and allows Customs Service Officers to search without a warrant if there is reasonable cause to believe money is being illegally transported. This title is not expected to have a significant budgetary effect.

Title X—Miscellaneous violent crime amendments.—Title X strengthens a number of provisions of law dealing with violent crime and creates several new offenses. Part D requires mandatory prison sentences for individuals convicted of using or carrying a firearm in a Federal crime of violence. A person would receive a five-year mandatory sentence for the first conviction and a ten-year mandatory sentence for the second conviction. Information provided by the Department of Justice suggests that about 2,000 Federal defendants would be affected by this provision each year. The average time served by an individual convicted of a violent crime is currently four years. Based on an average cost per prisoner of $13,000 in 1983, adjusted for inflation in future years, the longer sentences resulting from Part D are estimated to increase Federal expenditures for support of prisoners by $2 million in 1986, $6 million in 1987, and $23 million in 1988. If the average sentence for those affected by these mandatory sentences were to rise from four to six years as a result of these provisions, the annual cost by 1990 would be $60 million to $70 million.

The remaining sections of Title X are not expected to result in any significant additional cost to the government.

Title XI—Serious nonviolent offenses.—Title XI deals with serious nonviolent crimes, including child pornography, program fraud and bribery, bank fraud, bank bribery, and possession of contraband in prison. None of the amendments contained in this title are expected to have a significant effect on the Federal budget.

Title XII—Miscellaneous procedural amendments.—Part A of this title provides for juveniles charged with Federal crimes to be prosecuted in Federal courts and permits adult prosecution of juveniles charged with certain violent crimes. The Department of Justice expects this provision to increase the number of Federal defendants by 200 per year, necessitating the hiring of five additional attorneys and two additional support staff. The U.S. Marshals Service would also face increased costs as a result of handling a larger number of defendants. The total cost of Part A is estimated to be about $1 million annually.

The remaining parts of title XII are not expected to have any significant budgetary effect.

6. Estimated cost to State and local governments: State and local governments will incur various costs if they choose to participate in Office of Justice Assistance law enforcement grant programs authorized by title VI. The level of effort required of these governments is dependent on the type of grant. State and local governments' administrative costs are not expected to rise significantly as a result of the grants, since these governments already have personnel administering similar grant programs.

Formula grants.—State and local governments are required to contribute in cash 50 percent of the costs of projects eligible for formula grants. Formula grants to Indian tribes, however, may finance up to 100 percent of project costs. Federal aid is limited to no more than three years.

Discretionary grants.—Discretionary grants may fund up to 100 percent of a project's costs for three years, but State and local governments will incur 50 percent of the costs if Federal funding for projects is extended for an additional two years. States and localities may use funds from formula grants or other Federal or nonfederal sources to cover their share of the extended project costs. Total costs to States and localities will depend on the amount appropriated for discretionary grants.

National Institute of Justice and Bureau of Justice Statistics.—The National Institute of Justice and Bureau of Justice Statistics are authorized to provide State and local governments and nonprofit institutions with grants covering up to 100 percent of the cost of a law enforcement research project. However, the director of each agency may require the participating organization to contribute financial or nonfinancial resources to a project as a condition for receiving aid. The cost of this provision to State and local governments is dependent on the actions taken by the National Institute of Justice and the Bureau of Justice Statistics regarding matching fund requirements.

Prison construction aid.—Title VI authorizes direct grants or bond interest subsidies of up to $25 million annually to State and local governments for prison construction and renovation. If participating governments choose to receive aid in the form of grants, matching expenditures by States and localities will total $25 million a year between 1984 and 1987, since the grants have a 50 percent matching requirement. Some or all of these amounts might be spent by States and localities in any event.

7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Charles Essick.
10. Estimate approved by: C. G. Nuckols (For James L. Blum, Assistant Director for Budget Analysis).

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, it is hereby stated that the Committee anticipates that the bill will have no additional direct regulatory impact. After due consideration, the Committee concluded that the changes in existing law contained in the bill will not increase or diminish any present regulatory responsibilities of the United States Department of Justice or any other department or agency affected by the legislation.

ACTION BY THE COMMITTEE

On July 21, 1983, the Committee on the Judiciary considered an original bill, entitled the Comprehensive Crime Control Act of 1983. Several amendments were considered, as discussed below. On July 21, 1983, by a vote of 16 to 1, the Committee ordered an original committee bill [1] reported out with recommendation that it be passed by the Senate as follows:

YEAS (16)	NAYS (1)
Laxalt	Mathias
Hatch [2]	
Dole	
Simpson	
East	
Grassley	
Denton [2]	
Specter	
Biden	
Kennedy	
Metzenbaum [2]	
DeConcini [2]	
Leahy	
Baucus [2]	
Heflin	
Thurmond	

[2] By proxy.

The following amendments were adopted by voice vote:

1. Laxalt en bloc amendments.
2. Specter juvenile justice amendments.
3. Specter insanity defense amendment to insert the word "severe" with respect to mental disease or defect.

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[1] The Committee ordered reported an original committee bill. Since an original bill may not be reported with cosponsors, the text of the bill approved by the Committee was simultaneously introduced, referred to Committee, and reported (S. 1762)—with cosponsors.

The following amendments were defeated by rollcall vote, as indicated:

1. Mathias Amendment requiring the court to impose the least severe appropriate sanction, and to permit departure from the sentencing guideline when warranted by the facts of the case.

YEAS (2)

Mathias
Heflin

NAYS (15)

Laxalt
Hatch
Dole
Simpson [2]
East [2]
Grassley
Denton [2]
Specter
Biden
Kennedy
Metzenbaum
DeConcini
Leahy
Baucus [2]
Thurmond

[2] By proxy.

2. Mathias Amendment to authorize a commission within the Judicial Conference to draft sentencing guidelines, and to narrow the scope of the guidelines to focus on the sentencing decision.

YEAS (3)

Mathias
Specter
Heflin

NAYS (13)

Laxalt
Hatch
Dole [2]
Simpson [2]
East [2]
Grassley
Denton [2]
Biden
Kennedy
Metzenbaum [2]
DeConcini
Baucus [2]
Thurmond

[2] By proxy.

3. Mathias Amendment to authorize release on parole, on a date set by the sentencing judge pursuant to guidelines, for defendants whose post-conviction behavior had been acceptable and to authorize the sentencing court to order earlier release under extraordinary circumstances.

YEAS (3)

Mathias
DeConcini
Heflin

NAYS (13)

Laxalt
Hatch
Dole [2]
Simpson [2]
East [2]

Grassley
Denton [2]
Specter
Biden
Kennedy
Metzenbaum [2]
Baucus [2]
Thurmond

[2] By proxy.

4. Mathias Amendment to clarify Congressional intent by directing the Sentencing Commission to insure that its sentencing guidelines would not be likely to result in an increase in aggregate or overall average terms of imprisonment, or in the Federal prison population.

YEAS (1)

Mathias

NAYS (15)

Laxalt
Hatch
Dole [2]
Simpson [2]
East [2]
Grassley
Denton [2]
Specter
Biden
Kennedy
Metzenbaum [2]
DeConcini
Baucus [2]
Heflin
Thurmond

[2] By proxy.

5. DeConcini Amendment to create a select commission on drug interdiction and enforcement.

YEAS (6)

Hatch [2]
Dole
Grassley
Specter
DeConcini
Heflin

NAYS (8)

Laxalt
Simpson
East [2]
Denton [2]
Biden
Kennedy
Metzenbaum [2]
Thurmond

[2] By proxy.

6. Heflin Amendment to the insanity defense relating to expert witnesses.

YEAS (2)

DeConcini [2]
Heflin

NAYS (12)

Laxalt
Hatch [2]
Dole
Simpson

East [2]
Grassley
Denton [2]
Specter
Biden
Kennedy
Metzenbaum [2]
Thurmond

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[2] By proxy.

CHANGES IN EXISTING LAW

In compliance with paragraph (12) of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1762 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

CHANGES IN EXISTING LAW MADE BY TITLE I OF S. 1762

UNITED STATES CODE

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

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PART II—CRIMINAL PROCEDURE

Chapter	Sec.
201. General provisions	3001
203. Arrrest and commitment	3041
205. Searches and seizures	3101
[207. Release	3141]
207. Release and detention pending judicial proceedings	*3141*
208. Speedy trial	3161
209. Extradition	3181
211. Jurisdiction and venue	3231
213. Limitations	3281
215. Grand jury	3321
216. Special grand jury	3331
217. Indictment and information	3361
219. Trial by United States Magistrates	3401
221. Arraignment, pleas and trial	3431
223. Witnesses and evidence	3481
225. Verdict	3531
227. Sentence, judgment, and execution	3561
229. Fines, penalties and forfeitures	3611
231. Probation	3651
233. Contempts	3691
235. Appeals	3731
237. Rules of criminal procedure	3771

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CHAPTER 203—ARREST AND COMMITMENT

Sec.
3041. Power of courts and magistrates.
3042. Extraterritorial jurisdiction.
[3043. Security of the peace and good behavior.]

3043. Repealed.
3044. Complaint—Rule
3045. Internal Revenue violations.
3046. Warrants or summons—Rule.
3047. Multiple warrants unnecessary.
3048. Commitment to another district; removal—Rule.
3049. Warrant for removal.
3050. Bureau of Prisons employees' powers.
3052. Powers of Federal Bureau of Investigation.
3053. Powers of marshals and deputies.
3054. Officer's powers involving animals and birds.
3055. Officers' powers to suppress Indian liquor traffic.
3056. Secret Service powers.
3057. Bankruptcy investigations.
3058. Interned belligerent nationals.
3059. Rewards and appropriations therefor.
3060. Preliminary examination
3061. Powers of postal inspectors.
3062. General arrest authority for violation of release conditions.

§ 3041. Power of courts and magistrates

For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or magistrate shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond [determining to hold the prisoner for trial] *determining, pursuant to the provisions of section 3142 of this title, whether to detain or conditionally release the prisoner prior to trial* or to discharge him from arrest.

§ 3042. Extraterritorial Jurisdiction

Section 3041 of this title shall apply in any country where the United States exercises extraterritorial jurisdiction for the arrest and removal therefrom to the United States of any citizen or national of the United States who is a fugitive from justice charged with or convicted of the commission of any offense against the United States, and shall also apply throughout the United States for the arrest and removal therefrom to the jurisdiction of any officer or representative of the United States vested with judicial authority in any country in which the United States exercises extraterritorial jurisdiction, of any citizen or national of the United States who is fugitive from justice charged with or convicted of the commission of any offense against the United States in any country where it exercises extraterritorial jurisdiction.

Such fugitive first mentioned may, by any officer or representative of the United States vested with judicial authority in any country in which the United States exercises extraterritorial jurisdiction and agreeable to the usual mode of process against offenders subject to such jurisdiction, be arrested and [imprisoned or admitted to bail] *detained or conditionally released pursuant to section 3142 of this title* as the case may be, pending the issuance of a warrant for his removal, which warrant the principal officer or representative of the United States vested with judicial authority in the country where the fugitive shall be found shall reasonably issue, and the United States marshal or corresponding officer shall execute.

Such marshal or other officer, or the deputies of such marshal or officer, when engaged in executing such warrant without the jurisdiction of the court to which they are attached, shall have all the powers of a marshal of the United States so far as such powers are requisite for the prisoner's safekeeping and the execution of the warrant.

[§ 3043. Security of the peace and good behavior

[The justices or judges of the United States, the United States magistrates, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them.]

* * * * * * *

§ 3062. General arrest authority for violation of release conditions

A law enforcement officer, who is authorized to arrest for an offense committed in his presence, may arrest a person who is released pursuant to chapter 207 if the officer has reasonable grounds to believe that the person is violating, in his presence, a condition imposed on the person pursuant to section 3142 (c)(2)(D), (c)(2)(E), (c)(2)(H), (c)(2)(I), or (c)(2)(M), or, if the violation involves a failure to remain in a specified institution as required, a condition imposed pursuant to section 3142(c)(2)(J).

* * * * * * *

[CHAPTER 207—RELEASE]

CHAPTER 207—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS

Sec.

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[§ 3141. Power of courts and magistrates

[Bail may be taken by any court, judge or magistrate authorized to arrest and commit offenders, but only a court of the United States having original jurisdiction in criminal cases, or a justice or judge thereof, may admit to bail or otherwise release a person charged with an offense punishable by death.]

[§ 3142. Surrender by bail

[Any party charged with a criminal offense who is released on the execution of an appearance bail bond with one or more sureties, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy, and brought before any judge or other officer having power to commit for such offense; and at the request of such surety, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneretur of such surety; and the person so committed shall be held in custody until discharged by due course of law.]

[§ 3143. Additional bail

[When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously released on the execution of an appearance bail bond with one of more sureties on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.]

[§ 3144. Cases removed from State courts

[Whenever the judgment of a State Court in any criminal proceeding is brought to the Supreme Court of the United States for review, the defendant shall not be released from custody until a final judgment upon such review or, if the offense be bailable, until a bond, with sufficient sureties, in a reasonable sum, is given.]

[§ 3145. Parties and witnesses—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[On Preliminary Examination, Rule 5(b).
Before conviction; amount; sureties, forefeiture; exoneration, Rule 46.
Pending sentence, Rule 32(a).
Pending appeal or certiorari, Rules 38 (b), (c), 39(a), 46(a, 2).
Witness, Rule 46.]

[§ 3146. Release in noncapital cases prior to trial

[(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trail on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, and combination of the following conditions:

[(1) place the person in the custody of a designated person or organization agreeing to supervise him;

[(2) place restrictions of the travel, association, or place of abode of the person during the period of release;

[(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash, or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

[(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

[(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

[(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.]

[§ 3147. Appeal from conditions of release

[(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) or section 3146(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

[(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiciton over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly.]

[§ 3148. Release in capital cases or after conviction

[A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided*, That other rights to judicial review of conditions of release or orders of detention shall not be affected.]

[§ 3149. Release of material witnesses

[If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.]

[§ 3150. Penalties for failure to appear

[Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.]

[§ 3151. Contempt

[Nothing in this chapter shall interfer with or prevent the exercise by any court of the United States of its power to punish for contempt.]

§ 3141. Release and detention authority generally

(a) Pending Trial.—A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

(b) Pending Sentence or Appeal.—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

§ 3142. Release or detention of a defendant pending trial

(a) In General.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on his personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of subsection (b);

(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion pursuant to the provisions of subsection (d); or

(4) detained pursuant to the provisions of subsection (e).

(b) Release on Personal Recognizance or Unsecured Appearance Bond.—The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on Conditions.—If the judicial officer determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(B) maintain employment, or, if unemployed, actively seek employment;

(C) maintain or commence an educational program;

(D) abide by specified restrictions on his personal associations, place of abode, or travel;

(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(G) comply with a specified curfew;

(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(J) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(K) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

(d) TEMPORARY DETENTION TO PERMIT REVOCATION OF CONDITIONAL RELEASE, DEPORTATION, OR EXCLUSION.—If the judicial officer determines that—

(1) the person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

he shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B), the person has the burden of proving to the court that he is a citizen of the United States or is lawfully admitted for permanent residence.

(e) DETENTION.—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that—

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of *imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.*

(f) DETENTION HEARING.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any other person and the community in a case—

(1) upon motion of the attorney for the Government, that involves—

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

(D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C), or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed; or

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, that involves—

(A) a serious risk that the person will flee;

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety *of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing.*

(g) Factors To Be Considered.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L), the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of Release Order.—In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) CONTENTS OF DETENTION ORDER.—In a detention order issued pursuant to the provisions of subsection (e), the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) PRESUMPTION OF INNOCENCE.—Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

§ 3143. Release or detention of a defendant pending sentence or appeal

(a) RELEASE OR DETENTION PENDING SENTENCE.—The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment,[1] *be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142 (b) or (c). If the judicial officer makes such a finding, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).*

(b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT.—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142 (b) or (c); and

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

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[1] The language "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment,", is an amendment made to new section 3143(a) by section 214(g)(1) of title II of this bill. This amendment is necessary to conform the bail provisions of title I to the new sentencing system, if the latter is enacted.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

(c) Release or Detention Pending Appeal by the Government.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order. The judge shall treat a defendant in a case in which an appeal has been takan by the United States pursuant to the provisions of section 3742 in accordance with the provisions of—

(1) subsection (a) if the person has been sentenced to a term of imprisonment; or

(2) section 3142 if the person has not been sentenced to a term of imprisonment.[2]

§ 3144. Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

§ 3145. Review and appeal of a release or detention order

(a) Review of a Release Order.—If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

(b) Review of a Detention Order.—If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

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[2] The last sentence in subsection (c) is an amendment made to new section 3143(c) by section 213(g)(2) of title II of this bill. This amendment is necessary to conform the bail provisions of title I to the new sentencing system, if the latter is enacted.

(c) APPEAL FROM A RELEASE OR DETENTION ORDER.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

§ 3146. Penalty for failure to appear

(a) OFFENSE.—A person commits an offense if, after having been released pursuant to this chapter—

(1) he knowingly fails to appear before a court as required by the conditions of his release; or

(2) he knowingly fails to surrender for service of sentence pursuant to a court order.

(b) GRADING.—If the person was released—

(1) in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction, for—

(A) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, he shall be fined not more than $25,000 or imprisoned for not more than ten years, or both;

(B) an offense punishable by imprisonment for a term of five or more years, but less than fifteen years, he shall be fined not more than $10,000 or imprisoned for not more than five years, or both;

(C) any other felony, he shall be fined not more than $5,000 or imprisoned for not more than two years, or both; or

(D) a misdemeanor, he shall be fined not more than $2,000 or imprisoned for not more than one year, or both; or

(2) for appearance as a material witness, he shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

A term of imprisonment imposed pursuant to this section shall be consecutive to the sentence of imprisonment for any other offense.

(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that the defendant appeared or surrendered as soon as such circumstances ceased to exist.

(d) DECLARATION OF FORFEITURE.—If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) or is subject to the release condition set forth in section 3142(c)(2)(K), or (c)(2)(L), the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.

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§ 3147. Penalty for an offense committed while on release

A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—

(1) a term of imprisonment of not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.[3]

§ 3148. Sanctions for violation of a release condition

(a) AVAILABLE SANCTIONS.—A person who has been released pursuant to the provisions of section 3142, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

(b) REVOCATION OF RELEASE.—The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which his arrest was ordered for a proceeding in accordance with this section. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—

(1) finds that there is—

(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

(B) clear and convincing evidence that the person has violated any other condition of his release; and

(2) finds that—

(A) based on the factors set forth in section 3142(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, he shall treat the person in accordance with the provisions of section 3142 and may amend the conditions of release accordingly.

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[3] Section 3147 provided a mandatory prison term for an offense committed on release. If the sentencing provisions of title II are adopted, these mandatory penalties would be eliminated by section 213(h) of title II of this bill as unnecessary under a guidelines system. Section 3147 is so amended here so as to reflect elimination of the mandatory penalties.

(c) Prosecution for Contempt.—The judge may commence a prosecution for contempt, pursuant to the provisions of section 401, if the person has violated a condition of his release.

§ 3149. Surrender of an offender by a surety

A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, and if so arrested, shall be delivered promptly to a United States marshal and brought before a judicial officer. The judicial officer shall determine in accordance with the provisions of section 3148(b) whether to revoke the release of the person, and may absolve the surety of responsibility to pay all or part of the bond in accordance with the provisions of Rule 46 of the Federal Rules of Criminal Procedure. The person so committed shall be held in official detention until released pursuant to this chapter or another provision of law.

§ 3150. Applicability to a case removed from a State court

The provisions of this chapter apply to a criminal case removed to a Federal court from a State court.

* * * * * * *

§ 3154. Functions and powers of pretrial services agencies

Each pretrial services agency shall perform such of the following functions as the district court to be served may specify:

(1) Collect, verify, and report promptly to the judicial officer information, pertaining to the pretrial release of each person charged with an offense, **[**and recommend appropriate release conditions for each such person,**]** *and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release* but such information as may be contained in the agency's files or presented in its report or which shall be divulged during the course of any hearing shall be used only for the purpose of a bail determination and shall otherwise be confidential. In their respective districts, the Division of Probation or the Board of Trustees shall issue regulations establishing policy on the release of agency files. Such regulations shall create an exception to the confidentiality requirement so that such information shall be available to members of the agency's staff and to qualified persons for purposes of research related to the administration of criminal justice. Such regulations may create an exception to the confidentially requirement so that access to agency files will be permitted by agencies under contract pursuant to paragraph (4) of this section; to probation officers for the purpose of compiling a presentence report and in certain limited cases to law enforcement agencies for law enforcement purposes. In no case shall such information be admissible on the issue of guilt in any judicial proceeding, and in their respective districts, the Division of Probation or the Board of Trustees may permit such information to be used on the issue of guilt for a crime committed in the course of obtaining pretrial release.

(2) Review and modify the reports and recommendations *specified in paragraph (1) for persons seeking release pursuant* to [section 3146(e) or section 3147.] *section 3145.*

(3) Supervise persons released into its custody under this chapter.

* * * * * * *

§ 3156. Definitions

(a) As used in sections [3146] *3141*-3150 of this chapter—

(1) The term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to [bail or otherwise] *detain or* release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia; [and]

(2) The term "offense" means any criminal offense, other than an offense triable by court-marshal, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress[.]; *and*

(3) The term "felony" means an offense punishable by a maximum term of imprisonment of more than one year; and

(4) The term "crime of violence" means—

(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(b) As used in sections 3152-3155 of this chapter—

(1) The term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to [bail or otherwise] *detain or* release a person before trial or sentencing or pending appeal in a court of the United States, and

(2) The term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court martial, military commission, provost court, or other military tribunal).

* * * * * * *

CHAPTER 235—APPEAL

Sec.
3731. Appeal by United States.
3732. Taking of appeal; notice; time—Rule.
3733. Assignment of errors—Rule.
3734. Bill of exceptions abolished—Rule.
3735. Bail on appeal or certiorari—Rule.

3736. Certiorari—Rule.
3737. Record—Rule.
3738. Docketing appeal and record—Rule.
3739. Supervision—Rule.
3740. Argument—Rule.
3741. Harmless error and plain error—Rule.

§ 3731. Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

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CHAPTER 237—RULES OF CRIMINAL PROCEDURE

Sec.

3771. Procedure to and including verdict.
3772. Procedure after verdict.

* * * * * * *

§ 3772. Procedure after verdict

The Supreme Court of the United States shall have the power to prescribe from time to time rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or [bail] *release pending appeal.*

* * * * * * *

PART III—PRISONS AND PRISONERS

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303. Bureau of Prisons 4041
305. Commitment and transfer 4081
306.[1] Transfer to or from foreign countries 4100
307. Employment 4121
309. Good time allowances 4161
311. Parole 4201
313. Mental defectives 4241
314. Narcotic addicts 4251
315. Discharge and release payments 4281
317. Institutions for women 4321
319.[1] National Institute of Corrections 4351

[1] Heading for chapter editorially supplied.

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CHAPTER 315—DISCHARGE AND RELEASE PAYMENTS

Sec.
4281. Discharge from prison.
4282. Arrested but unconvicted persons.
4283. Probation.
4284. Advances for rehabilitation.
4285. Persons released pending further judicial proceedings.

* * * * * * *

§ 4282. Arrested but unconvicted persons

On the release from custody of a person arrested on a charge of violating any law of the United States or of the Territory of Alaska, but not indicted nor informed against, or indicted or informed against but not convicted, [and not admitted to bail] *and detained pursuant to chapter 207,* or a person held as a material witness [and unable to make bail], the court in its discretion may direct the United States marshal for the district wherein he is released, pursuant to regulations promulgated by the Attorney General, to furnish the person so released with transportation and subsistence to the place of his arrest, or, at his election, to the place of his bona fide residence if such cost is not greater than to the place of arrest.

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FEDERAL RULES OF CRIMINAL PROCEDURE

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II. PRELIMINARY PROCEEDINGS

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Rule 5. Initial Appearance before the Magistrate

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(c) Offenses Not Triable by the United States Magistrate.—If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and [shall admit the defendant to bail] *shall detain or conditionally release the defendant* as provided by statute or in these rules.

* * * * * * *

Rule 15. Depositions

(a) WHEN TAKEN.—Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is [committed for failure to give bail to appear to testify at a trial or hearing] *detained pursuant to section 3144 of title 18, United States Code*, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

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IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Commitment to Another District

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[(f) BAIL.—If bail was previously fixed in another district where a warrant, information or indictment issued, the Federal magistrate shall take into account the amount of bail previously fixed and the reasons set forth therefor, if any, but will not be bound by the amount of bail previously fixed. If the Federal magistrate fixes bail different from that previously fixed, he shall set forth the reasons for his action in writing.]

(f) RELEASE OR DETENTION.—If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information or indictment issued, the Federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the Federal magistrate amends the release or detention decision or alters the conditions of release, he shall set forth the reasons for his action in writing.

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X. GENERAL PROVISIONS

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Rule 46. Release from Custody

(a) RELEASE PRIOR TO TRIAL. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. [§ 3146, § 3148, § 3149.] *§§ 3142 and 3144.*

* * * * * * *

(c) PENDING SENTENCE AND NOTICE OF APPEAL. Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § [3148.] *3143.* The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

* * * * * * *

(e) FORFEITURE.—

(1) DECLARATION.—If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

[(2) SETTING ASIDE.—The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.]

(2) SETTING ASIDE.—The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture.

* * * * * * *

(h) FORFEITURE OF PROPERTY.—Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 3142(c)(2)(K) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.

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Rule 54. Application and Exception

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(b) PROCEEDINGS.—

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(3) PEACE BONDS.—These rules do not alter the power of judges of the United States magistrates to hold to security of the peace and for good behavior [under 18 U.S.C. § 3043, and] under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

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TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE

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CHAPTER 43—UNITED STATES MAGISTRATES

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§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations [impose conditions of release under section 3146 of title 18] *issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial* and take acknowledgements, affidavits, and depositions; and

* * * * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 9. Release in Criminal Cases

* * * * * * *

(c) CRITERIA FOR RELEASE.—The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § [3148] *3143.* The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community *and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial* rests with the defendant.

* * * * * * *

CHANGES IN EXISTING LAW MADE BY TITLE II OF S. 1762

UNITED STATES CODE

* * * * * * *

TITLE 8: ALIENS AND NATIONALITY

* * * * * * *

CHAPTER 12—IMMIGRATION AND NATIONALITY

Subchapter I—General Provisions

* * * * * * *

Part II—Admission Qualifications for Aliens; Travel Control of Citizens and Aliens

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§ 1182. Excludable aliens—General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * * * *

(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; except that aliens who have committed only one such crime while under the age of eighteen years may be granted a visa and admitted if the crime was committed more than five years prior to the date of the application for a visa or other documentation, and more than five years prior to date of application for admission to the United States, unless the crime resulted in confinement in a prison or correctional institution, in which case such alien must have been released from such confinement more than five years prior to the date of the application for a visa or other documentation, and for admission, to the United States. **[**Any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18, by reason of the punishment actually imposed, or who would be excludable as one who admits the commission of an offense that is classifiable as a misdemeanor under the provisions of section 1(2) of Title 18, by reason of the punishment which might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admissible: *Provided,* That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.**]** *An alien who would be excludable because of the conviction of an offense for which the sentence actually imposed did not exceed a term of imprisonment in excess of six months, or who would be excludable as one who admits the commission of an offense for which a sentence not to exceed one year's imprisonment might have been imposed on him, may be granted a visa and admitted to the United States if otherwise admissible: Provided, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.*

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Subchapter II—Immigration

Part V—Deportation; Adjustment of Status

§ 1252. Apprehension and deportation of aliens—Arrest and custody; review of determination by court

* * * * * * *

SERVICE OF PRISON SENTENCE PRIOR TO DEPORTATION

(h) An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, *supervised release*, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

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TITLE 16: CONSERVATION

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CHAPTER 1.—NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND SEASHORES

* * * * * * *

§ 460k-3. Charges and fees; permits; regulations; penalties

The Secretary may establish reasonable charges and fees and issue permits for public use of national wildlife refuges, game ranges, national fish hatcheries, and other conservation areas administered by the Department of the Interior for fish and wildlife purposes. The Secretary may issue regulations to carry out the purposes of sections 460k to 460k-4 of this title. A violation of such regulations shall be a **[**petty offense (section 1 of Title 18)**]** *misdemeanor* with maximum penalties of imprisonment for not more than six months, or a fine of not more than $500, or both.

* * * * * * *

§ 460n-8. United States magistrate, appointment; functions; practice and procedure; probation; fees

A United States magistrate [1] shall be appointed for that portion of the Lake Mead National Recreation Area that is situated in Mohave County, Arizona. Such magistrate shall be appointed by the United States district court having jurisdiction thereover, and the magistrate shall serve as directed by such court, as well as pursuant to, and within the limits of, the authority of said court.

[The functions of such magistrate shall include the trial and sentencing of persons committing petty offenses, as defined in Title

---

[1] Note: Sec. 212 of the bill amends 16 U.S.C. 460n-8 to change "commissioner" to "magistrate". Magistrate has already been inserted by the codifier per Public Law 90-578, title IV, § 402, Oct. 17, 1968, Stat. 118.

18, section 1: *Provided,* That any person charged with a petty offense may elect to be tried in the district court of the United States, and the magistrate shall apprise the defendant of his right to make such election, but shall not proceed to try the case unless the defendant, after being so apprised, signs a written consent to be tried before the magistrate.]

The functions of the magistrate shall include the trial and sentencing of persons charged with the commission of misdemeanors and infractions as defined in section 3581 of title 18, United States Code. The exercise of additional functions by the magistrate shall be consistent with and be carried out in accordance with the authority, laws, and regulations, of general application to United States magistrates. The provisions of Title 18, section 3402, and the rules of procedure and practice prescribed by the Supreme Court pursuant thereto, shall apply to all cases handled by such magistrate. The probation laws shall be applicable to persons tried by the magistrate and he shall have power to grant probation. The magistrate shall receive the fees, and none other, provided by law for like or similar services.

* * * * * * *

TITLE 18: CRIMES AND CRIMINAL PROCEDURE

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III. Prisons and prisoners — 4001
IV. Correction of youthful offenders — 5001
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Appendix
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II. Interstate agreement on detainers.
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PART I—CRIMES

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5. Arson — 81
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[1] Heading of chapter amended without amending analysis.

[2] Chapter added without adding chapter heading to analysis.

CHAPTER 1—GENERAL PROVISIONS

Sec.

[1. Offenses classified.] [1. *Repealed.*]
2. Principals.
3. Accessory after the fact.
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7. Special maritime and teritorial jurisdiction of the United States defined.
8. Obligation or other security of the United States defined.
9. Vessel of the United States defined.
10. Interstate commerce and foreign commerce defined.
11. Foreign government defined.
12. United States Postal Service defined.
13. Laws of States adopted for areas within Federal jurisdiction.
14. Applicability to Canal Zone; definition.
15. Obligation or other security of foreign government defined.

[§ 1. Offenses classified

[Notwithstanding any Act of Congress to the contrary:

[(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

[(2) Any other offense is a misdemeanor.

[(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.]

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CHAPTER 44—FIREARMS

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922. Unlawful acts.
923. Licensing.
924. Penalties.
925. Exceptions: Relief from disabilities.
926. Rules and regulations.
927. Effect on State law.
928. Separability clause.[1]

[1] So in original. Does not conform to section catchline.

* * * * * * *

§ 924. Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both [, and shall become eligible for parole as the Board of Parole shall determine].

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CHAPTER 53—INDIANS

Sec.
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1157. Livestock sold or removed.[1]

1158. Counterfeiting Indian Arts and Crafts Board trade mark.
1159. Misrepresentation in sale of products.
1160. Property damaged in committing offense.
1161. Application of Indian liquor laws.
1162. State jurisdiction over offenses committed by or against Indians in the Indian country.
1163. Embezzlement and theft from Indian tribal organizations.
1164. Destroying boundary and warning signs.
1165. Hunting, trapping, or fishing on Indian land.

[1] Pub. L. 85-86, July 10, 1957, 71 Stat. 277, which repealed section 1157 of this title, did not amend analysis to reflect the repeal.

* * * * * * *

§ 1161. Application of Indian liquor laws

The provisions of sections 1154, 1156, 3113, 3488, and [3618] *3669*, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

* * * * * * *

CHAPTER 85—PRISON-MADE GOODS

Sec.
1761. Transportation or importation.
1762. Marking packages.

§ 1761. Transportation or importation

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, *supervised release,* or probation, or in any penal or reformatory institution, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

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CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

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Sec.
1963. Criminal penalties

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§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States [(1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.] *the property described in section 3554 in accord with the provisions of that section.*

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commerically feasible, making due provision for the rights of innocent persons.[1]

* * * * * * *

CHAPTER 103—ROBBERY AND BURGLARY

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211. Special maritime and territorial jurisdiction.
212. Personal property of United States.
213. Bank robbery and incidental crimes.
214. Mail, money, or other property of United States.
215. Post office.
216. Railway or steamboat post office.
217. Breaking or entering carrier facilities.

* * * * * * *

§ 2114. Mail, money or other property of United States

Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned *not more than* twenty-five years.

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[1] Note: Subsections (b) and (c) of § 1963 were inadvertently repealed by the bill. § 1963 is also amended by title III of this bill (Forfeiture).

* * * * * * *

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[1] So in original. Catchline reads "court room".

* * * * * * *

§ 3006A. Adequate representation of defendants

(a) CHOICE OF PLAN.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or [misdemeanor (other than a petty offense as defined in section 1 of this title)] *Class A misde-*

meanor or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is [subject to revocation of parole,] in custody as a material witness, or seeking collateral relief, as provided in subsection (g), or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h).

(b) APPOINTMENT OF COUNSEL.—Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every criminal case in which the defendant is charged with a felony or a [misdemeanor (other than a petty offense as defined in section 1 of this title)] *Class A misdemeanor* or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defndant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

* * * * * * *

(g) DISCRETIONARY APPOINTMENTS.—Any person [subject to revocation of parole,] in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 or section 4245 of title 18 may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (d) and (e).

* * * * * * *

[§ 3012. Orders respecting persons in custody

[Prisoners or persons in custody shall be brought into court or returned on order of the Court or of the United States Attorney, for which no fee shall be charged and no writ required]

* * * * * * *

CHAPTER 207—RELEASE

Sec.
3141. Power of courts and magistrates
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§ 3156. Definitions

(a) As used in sections 3146–3150 of this chapter—

* * * * * * *

(b) As used in sections 3152–3155 of this chapter—

* * * * * * *

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a [petty offense as defined in section 1(3) of this title] *Class B or C misdemeanor or an infraction*, or an offense triable by court-martial, military commission provost court, or other military tribunal).

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§ 3172. Definitions

As used in this chapter—

* * * * * * *

(2) the term, "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a [petty offense as defined in section 1(3) of this title] *Class B or C misdemeanor or an infraction*, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

* * * * * * *

CHAPTER 219—TRIAL BY UNITED STATES MAGISTRATES

Sec.
3401. Misdemeanors; application of probation laws.
3402. Rules of procedure, practice and appeal.

§ 3401. Misdemeanors; application of probation laws

* * * * * * *

[(g) The magistrate may, in a case involving a youth offender in which consent to trial before a magistrate has been filed under subsection (b) of this section, impose sentence and exercise the other powers granted to the district court under chapter 402 and section 4216 of this title, except that—

[(1) the magistrate may not sentence the youth offender to the custody of the Attorney General pursuant to such chapter for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense;

[(2) such youth offender shall be released conditionally under supervision no later than 3 months before the expiration of the term imposed by the magistrate, and shall be discharged unconditionally on or before the expiration of the maximum sentence imposed; and

[(3) the magistrate may not suspend the imposition of sentence and place the youth offender on probation for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense.]

[(h)] *(g)* The magistrate may, in a [petty offense case] *Class B or C misdemeanor case, or infraction case,* involving a juvenile in which consent to trial before a magistrate has been filed under subsection (b) of this section, exercise all powers granted to the district court under chapter 403 of this title. For purposes of this subsection, proceedings under chapter 403 of this title may be instituted against a juvenile by a violation notice or complaint, except that no such case may proceed unless the certification referred to in section 5032 of this title has been filed in open court at the arraignment. No *term of imprisonment shall* be imposed by the magistrate in any such case.

* * * * * * *

[CHAPTER 227—SENTENCE, JUDGMENT, AND EXECUTION

[Sec.
[3561. Judgment form and entry—Rule.
[3562. Sentence—Rule.
[3563. Corruption of blood or forfeiture of estate.
[3564. Pillory and whipping.
[3565. Collection and payment of fines and penalties.
[3566. Execution of death sentence.
[3567. Death sentence may prescribe dissection.
[3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.
[3569. Discharge of indigent prisoner.
[3570. Presidential remission as affecting unremitted part.
[3571. Clerical mistakes—Rule.
[3572. Correction or reduction of sentence—Rule.
[3573. Arrest or setting aside of judgment—Rule.
[3574. Stay of execution; supersedeas—Rule.
[3575. Increased sentence for dangerous special offenders.
[3576. Review of sentence.
[3577. Use of information for sentencing.
[3578. Conviction records.]

[§ 3561. Judgment form and entry—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Judgment to be signed by judge and entered by clerk, Rule 32(b).]

[§ 3562. Sentence—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Imposition of sentence; commitment; bail; presentence investigation and report, Rule 32(a, c).]

[§ 3563. Corruption of blood or forfeiture of estate

[No conviction or judgment shall work corruption of blood or any forfeiture of estate.]

[§ 3564. Pillory and whipping

[The punishment of whipping and of standing in the pillory shall not be inflicted.]

[§ 3565. Collection and payment of fines and penalties

[In all criminal cases in which judgment or sentence is rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, such judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases. Where the judgment directs imprisonment until the fine or penalty imposed is paid, the issue of execution on the judgment shall not discharge the defendant from imprisonment until the amount of the judgment is paid.]

[§ 3566. Execution of death sentence

[The manner of inflicting the punishment of death shall be that prescribed by the laws of the place within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available local facilities and the services of an appropriate local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney General. If the laws of the place within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other place in which such sentence shall be executed in the manner prescribed by the laws thereof.]

[§ 3567. Death sentence may prescribe dissection

[The court before which any person is convicted of murder in the first degree, or rape, may, in its discretion add to the judgment of death, that the body of the offender be delivered to a surgeon for dissection; and the marshal who executes such judgment shall deliver the body, after execution to such surgeon as the court may direct; and such suregon, or some person appointed by him, shall receive and take away the body at the time of execution.]

[§ 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

[The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

[If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

[No sentence shall prescribe any other method of computing the term.]

[§ 3569. Discharge of indigent prisoner

[(a) When a poor convict, sentenced for violation of any law of the United States by any court established by enactment of Congress, to be imprisoned and pay a fine, or fine and costs, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to the nearest United States magistrate in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the magistrate shall proceed to hear and determine the matter.

[If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the magistrate shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, exceeding $20, except such as is by law exempt from being taken on civil process for debt; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." Upon taking such oath such convict shall be discharged; and the magistrate shall file with the institution in which the convict is confined, a certificate setting forth the facts. In case the convict is found by the magistrate to possess property valued at an amount in excess of said exemption, nevertheless, if the Attorney General finds that the retention by such convict of all of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for the nonpayment of such fine, or fine and costs; or if he finds that the retention by such convict of any part of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for nonpayment of such fine or fine and costs upon payment on account of his fine and costs, of that portion of his property in excess of the amount found to be reasonably necessary for his support or that of his family.

[(b) Any such indigent prisoner in a Federal institution may, in the first instance, make his application to the warden of such institution, who shall have all the powers of a United States magistrate in such matters, and upon proper showing in support of the application shall administer the oath required by subsection (a) of this section, discharge the prisoner, and file his certificate to that effect in the records of the institution.

[Any such indigent prisoner, to whom the warden shall fail or refuse to administer the oath may apply to the nearest magistrate for the relief authorized by this section and the magistrate shall proceed de novo to hear and determine the matter.]

[§ 3570. Presidential remission as affecting unremitted part

[Whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the President's remission in whole or in part of either kind shall not impair the legal validity of the other kind, or of any portion of either kind, not remitted.]

[§ 3571. Clerical mistakes—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Court empowered to correct clerical mistakes in judgments, orders, or record, Rule 36.]

[§ 3572. Correction or reduction of sentence—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Court empowered to correct or reduce sentence; time, Rule 35.]

[§ 3573. Arrest or setting aside of judgment—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Arrest of judgment, grounds and motion, time, Rule 34.

[Setting aside judgment and permitting withdrawal of plea of guilty, Rule 32(d).]

[§ 3574. Stay of execution; supersedeas—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Death or imprisonment sentence, fines stayed on appeal; conditions and power of court, Rule 38(a).]

[§ 3575. Increased sentence for dangerous special offenders

[(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

[(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

[(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

[(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

[(e) A defendant is a special offender for purposes of this section if—

> [(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

[(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

[(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

[(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

[(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.]

[§ 3576. Review of sentence

[With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.]

[CHAPTER 229—FINES, PENALTIES AND FORFEITURES

[Sec.
[3611. Firearms possessed by convicted felons.
[3612. Bribe moneys.
[3613. Fines for setting grass and timber fires.
[3614. Fine for seduction.
[3615. Liquors and related property; definitions.
[[3616. Repealed.]
[3617. Remission or mitigation of forfeitures under liquor laws; possession pending trial.
[3618. Conveyances carrying liquor.
[3619. Disposition of conveyances seized for violation of the Indian liquor laws.
[3620. Vessels carrying explosives and steerage passengers.]

* * * * * * *

[§ 3613. Fines for setting grass and timber fires

[In all cases arising under sections 1855 and 1856 of this title the fines collected shall be paid into the public-school fund of the county in which the lands where the offense was committed are situated.]

[§ 3614. Fine for seduction

[When a person is convicted of a violation of section 2198 of this title and fined, the court may direct that the amount of the fine, when paid, be paid for the use of the female seduced, or her child, if she have any.]

* * * * * * *

[CHAPTER 231—PROBATION

[Sec.
[3651. Suspension of sentence and probation.
[3652. Probation—Rule.
[3653. Report of probation officer and arrest of probationer.
[3654. Appointment and removal of probation officers.
[3655. Duties of probation officers.
[3656. Duties of Director of Administrative Office of the United States Courts.]

[§ 3651. Suspension of sentence and probation

[Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

[Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant place on probation for such period and upon such terms and conditions as the court deems best.

[Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts of indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

[The court may revoke or modify any condition of probation, or may change the period of probation.

[The period of probation, together with any extension thereof, shall not exceed five years.

[While on probation and among the conditions thereof, the defendant—

[May be required to pay a fine in one or several sums; and

[May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

[May be required to provide for the support of any persons, for whose support he is legally responsible.

[The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: *Provided*, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

[A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

[The court may require a person who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

[The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.]

[§ 3652. Probation—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[Probation as provided by law, Rule 32(e).
[Presentence investigation, Rule 32(c).]

[§ 3653. Report of probation officer and arrest of probationer

[When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

[Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

[At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be retuned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the distirct in which he is found, and in that case he shall be detained pending further proceedings in such district.

[As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.]

[§ 3654. Appointment and removal of probation officers

[Any court having original jurisdiction to try offenses against the United States may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the court making such appointment.

[All such probation officers shall serve without compensation except that in case it shall appear to the court that the needs of the service require that there should be salaried probation officers, such court may appoint such officers.

[Such court may in its discretion remove a probation officer serving in such court.

[The appointment of a probation officer shall be in writing and shall be entered on the records of the court, and a copy of the order of appointment shall be delivered to the officer so appointed and a copy sent to the Director of the Administrative Office of the United States Courts.

[Whenever such court shall have appointed more than one probation officer, one may be designated chief probation officer and shall direct the work of all probation officers serving in such court.]

[§ 3655. Duties of probation officers

[The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

[He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

[He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition.

[He shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Director of the Administrative Office of the United States Courts as he may at any time require; and shall perform such other duties as the court may direct.

[Each probation officer shall perform such duties with respect to persons on parole as the United States Parole Commission shall request.]

CHAPTER 227—SENTENCES

Subchapter
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B. Probation *3561*
C. Fines *3571*
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Subchapter A—General Provisions

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Subchapter A—General Provisions

§ 3551. Authorized sentences

(a) In General.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) ORGANIZATIONS.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B; or

(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

§ 3552. Presentence reports

(a) PRESENTENCE INVESTIGATION AND REPORT BY PROBATION OFFICER.—A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

(b) PRESENTENCE STUDY AND REPORT BY BUREAU OF PRISONS.—If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall take no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in

accordance with the sentencing alternatives and procedures available under this chapter.

(c) PRESENTENCE EXAMINATION AND REPORT BY PSYCHIATRIC OR PSYCHOLOGICAL EXAMINERS.—If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order that the defendant undergo a psychiatric or psychological examination and that the court be provided with a written report of the results of the examination pursuant to the provisions of section 4247.

(d) DISCLOSURE OF PRESENTENCE REPORTS.—The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

§ 3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; and

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

(c) Statement of Reasons for Imposing a Sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the sentence does not include an order of restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence Procedure for an Order of Notice or Restitution.—Prior to imposing an order of notice pursuant to section 3555, or an order of restitution pursuant to section 3556, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

§ 3555. Order of notice to victims

The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give *such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.*

§ 3556. Order of restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense under this title, or an offense under section 902 (h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664.

§ 3557. Review of a sentence

The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

§ 3558. Implementation of a sentence

The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

§ 3559. Sentencing classification of offenses

(a) CLASSIFICATION.—An offense that is not specifically classified by a letter grade in the section defining it, is classified—

(1) if the maximum term of imprisonment authorized is—

(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(B) twenty years or more, as a Class B felony;

(C) less than twenty years but ten or more years, as a Class C felony;

(D) less than ten years but five or more years, as a Class D felony;

(E) less than five years but more than one year, as a Class E felony;

(F) one year or less but more than six months, as a Class A misdemeanor;

(G) six months or less but more than thirty days, as a Class B misdemeanor;

(H) thirty days or less but more than five days, as a Class C misdemeanor; or

(I) five days or less, or if no imprisonment is authorized, as an infraction.

(b) EFFECT OF CLASSIFICATION.—An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is the greater; and

(2) the maximum term of imprisonment is the term authorized by the statute describing the offense.

Subchapter B—Probation

Sec.

3561. Sentence of probation.
3562. Imposition of a sentence of probation.
3563. Conditions of probation.
3564. Running of a term of probation.
3565. Revocation of probation.
3566. Implementation of a sentence of probation.

Subchapter B—Probation

§ 3561. Sentence of probation

(a) In General.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

(1) the offense is a Class A or Class B felony;

(2) the offense is an offense for which probation has been expressly precluded; or

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

(b) Authorized Terms.—The authorized terms of probation are—

(1) for a felony, not less than one nor more than five years;

(2) for a misdemeanor, not more than five years; and

(3) for an infraction, not more than one year.

§ 3562. Imposition of a sentence of probation

(a) Factors To Be Considered in Imposing a Term of Probation.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

(b) Effect of Finality of Judgment.—Notwithstanding the fact that a sentence of probation can subsequently be—

(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

§ 3563. Conditions of probation

(a) Mandatory Conditions.—The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

(b) Discretionary Conditions.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section

3553 (a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

(1) support his dependents and meet other family responsibilities;

(2) pay a fine imposed pursuant to the provisions of subchapter C;

(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;

(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;

(13) work in community service as directed by the court;

(14) reside in a specified place or area, or refrain from residing in a specified place or area;

(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(16) report to a probation officer as directed by the court or the probation officer;

(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

(20) satisfy such other conditions as the court may impose.

(c) Modifications of Conditions.—The court may, after a hearing, modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

(d) Written Statement of Conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

§ 3564. Running of a term of probation

(a) Commencement.—A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

(b) Concurrence With Other Sentences.—Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any Federal, State, or local term of probation, or supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation, except that it does not run during any period in which the defendant is imprisoned for a period of at least 30 consecutive days in connection with a conviction for a Federal, State, or local crime.

(c) Early Termination.—The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

(d) Extension.—The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

(e) Subject to Revocation.— A sentence of probation remains conditional and subject to revocation until its expiration or termination.

§ 3565. Revocation of probation

(a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

(1) continue him on probation, with or without extending the term of modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

(b) Delayed Revocation.—The power of the court to revoke a sentence of probation for violation of a condition of probation, and

to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

§ 3566. Implementation of a sentence of probation

The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

Subchapter C—Fines

Sec.
3571. Sentence of fine.
3572. Imposition of a sentence of fine.
3573. Modification or remission of fine.
3574. Implementation of a sentence of fine.

Subchapter C—Fines

§ 3571. Sentence of fine

(a) In General.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) Authorized Fines.—Except as otherwise provided in this chapter, the authorized fines are—

- *(1) if the defendant is an individual—*
  - *(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;*
  - *(B) for any other misdemeanor, not more than $25,000; and*
  - *(C) for an infraction, not more than $1,000; and*
- *(2) if the defendant is an organization—*
  - *(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $500,000;*
  - *(B) for any other misdemeanor, not more than $100,000; and*
  - *(C) for an infraction, not more than $10,000.*

§ 3572. Imposition of a sentence of fine

(a) Factors To Be Considered in Imposing Fine.—The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider—

- *(1) the factors set forth in section 3553(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;*
- *(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant;*
- *(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the de-*

fendant to make such restitution or reparation to the victim of the offense;

(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

(5) any other pertinent equitable consideration.

(b) LIMIT ON AGGREGATE OF MULTIPLE FINES.—Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

(c) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

(1) modified or remitted pursuant to the provisions of section 3573;

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(d) TIME AND METHOD OF PAYMENT.—At the time a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, payment is due immediately.

(e) ALTERNATIVE SENTENCE PRECLUDED.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

(f) INDIVIDUAL RESPONSIBILITY FOR PAYMENT.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

§ 3573. Modification or remission of fine

(a) PETITION FOR MODIFICATION OR REMISSION.—A defendant who has been sentenced to pay a fine, and who—

(1) has paid part but not all thereof, and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the time or method specified, may petition the court for—

(A) an extension of the time for payment;

(B) a modification in the method of payment; or

(C) a remission of all or part of the unpaid portion; or

(2) has thereafter voluntarily made restitution or reparation to the victim of the offense, may petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

(b) ORDER OF MODIFICATION OR REMISSION.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order.

§ 3574. Implementation of a sentence of fine

The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

Subchapter D—Imprisonment

Sec.

3581. Sentence of imprisonment.
3582. Imposition of a sentence of imprisonment.
3583. Inclusion of a term of supervised release after imprisonment.
3584. Multiple sentences of imprisonment.
3585. Calculation of a term of imprisonment.
3586. Implementation of a sentence of imprisonment.

Subchapter D—Imprisonment

§ 3581. Sentence of imprisonment

(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

(b) AUTHORIZED TERMS.—The authorized terms of imprisonment are—

(1) for a Class A felony, the duration of the defendant's life or any period of time;
(2) for a Class B felony, not more than twenty-five years;
(3) for a Class C felony, not more than twelve years;
(4) for a Class D felony, not more than six years;
(5) for a Class E felony, not more than three years;
(6) for a Class A misdemeanor, not more than one year;
(7) for a Class B misdemeanor, not more than six months;
(8) for a Class C misdemeanor, not more than thirty days; and
(9) for an infraction, not more than five days.

§ 3582. Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);
(2) corrected pursuant to the provisions of rule 35 and section 3742; or
(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—The authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than three years;

(2) for a Class C or Class D felony, not more than two years; and

(3) for a Class E felony, or for a misdemeanor, not more than one year.

(c) Factors To Be Considered in Including a Term of Supervised Release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553 (a)(1), (a)(2)(B), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553 (a)(2)(B) and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563 (b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of Term or Conditions.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release previously ordered and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the term and conditions of post-release supervision; or

(3) treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title.

(f) Written Statement of Conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

§ 3584. Multiple sentences of imprisonment

(a) Imposition of Concurrent or Consecutive Terms.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is

already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

§ 3585. Calculation of a term of imprisonment

(a) COMMENCEMENT OF SENTENCE.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

§ 3586. Implementation of a sentence of imprisonment

The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

CHAPTER 229—POSTSENTENCE ADMINISTRATION

Subchapter
A. Probation *3601*
B. Fines *3611*
C. Imprisonment *3621*

Subchapter A—Probation

Sec.
3601. Supervision of probation.
3602. Appointment of probation officers.
3603. Duties of probation officers.
3604. Transportation of a probationer.

3605. Transfer of jurisdiction over a probationer.
3606. Arrest and return of a probationer.
3607. Special probation and expungement procedures for drug possessor.

Subchapter A—Probation

§ 3601. Supervision of probation

A person who has been sentenced to probation pursuant to the provisions of subchapter B of chapter 227, or placed on probation pursuant to the provisions of chapter 403, or placed on supervised release pursuant to the provisions of section 3583, shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

§ 3602. Appointment of probation officers

(a) APPOINTMENT.—A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation, and may, in its discretion, remove a probation officer appointed to serve without compensation.

(b) RECORD OF APPOINTMENT.—The order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts.

(c) CHIEF PROBATION OFFICER.—If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the judicial district.

§ 3603. Duties of probation officers

A probation officer shall—

(a) instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;

(b) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;

(c) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;

(d) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district;

(e) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;

(f) upon request of the Attorney General or his designee, supervise and furnish information about a person within the cus-

tody of the Attorney General while on work release, furlough, or other authorized release from his regular place of confinement, or while in prerelease custody pursuant to the provisions of section 3624(c); and

(g) perform any other duty that the court may designate.

§ 3604. Transportation of a probationer

A court, after imposing a sentence of probation, may direct a United States marshal to furnish the probationer with—

(a) transportation to the place to which he is required to proceed as a condition of his probation; and

(b) money, not to exceed such amount as the Attorney General may prescribe, for subsistence expenses while traveling to his destination.

§ 3605. Transfer of jurisdiction over a probationer

A court, after imposing a sentence, may transfer jurisdiction over a probationer or person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his probation or release, or is permitted to proceed, with the concurrence of such court. A later transfer of jurisdiction may be made in the same manner. A court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer or releasee that are permitted by this subchapter or subchapter B or D of chapter 227.

§ 3606. Arrest and return of a probationer

If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant. The court having supervision of the probationer or releasee, or, if there is no such court, the court last having supervision of the probationer or releasee, may issue a warrant for the arrest of a probationer or releasee for violation of a condition of release, and a probation officer or United States marshal may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found.

§ 3607. Special probation and expungement procedures for drug possessors

(a) Pre-Judgment Probation.—If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)—

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of *probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.*

(b) RECORD OF DISPOSITION.—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) EXPUNGEMENT OF RECORD OF DISPOSITION.—If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

Subchapter B—Fines

Sec.
3611. Payment of a fine.
3612. Collection of an unpaid fine.
3613. Lien provisions for satisfaction of an unpaid fine.

Subchapter B—Fines

§ 3611. Payment of a fine

A person who has been sentenced to pay a fine pursuant to the provisions of subchapter C of chapter 227 shall pay the fine immediately, or by the time and method specified by the sentencing court, to the clerk of the court. The clerk shall forward the payment to the United States Treasury.

§ 3612. Collection of an unpaid fine

(a) Certification of Imposition.—If a fine is imposed, the sentencing court shall promptly certify to the Attorney General—

(1) the name of the person fined;

(2) his last known address;

(3) the docket number of the case;

(4) the amount of the fine imposed;

(5) the time and method of payment specified by the court;

(6) the nature of any modification or remission of the fine; and

(7) the amount of the fine that is due and unpaid.

The court shall thereafter promptly certify to the Attorney General the amount of any subsequent payment that the court may receive with respect to, and the nature of any subsequent remission or modification of, a fine concerning which certification has previously been issued.

(b) Responsibility for Collection.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (a). An order of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid.

§ 3613. Lien provisions for satisfaction of an unpaid fine

(a) Lien.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). On application of the person fined, the Attorney General shall—

(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

(b) Expiration of Lien.—A lien becomes unenforceable and liability to pay a fine expires—

(1) twenty years after the entry of the judgment; or

(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), *6503(f), 6503(i), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.*

(c) Application of Other Lien Provisions.—The provisions of sections 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to "the Secretary" shall be construed to mean "the Attorney General," and references in those sections to "tax" shall be construed to mean "fine."

(d) Effect of Notice of Lien.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providng for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

(e) Alternative Enforcement.—Notwithstanding any other provision of this section, a judgment imposing a fine may be enforced by execution against the property of the person fined in like manner as judgments in civil cases, but in no event shall liability for payment of a fine extend beyond the period specified in subsection (b).

(f) Discharge of Debts Inapplicable.—No discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine.

Subchapter C—Imprisonment

Sec.
3621. Imprisonment of a convicted person.
3622. Temporary release of a prisoner.
3623. Transfer of a prisoner to state authority.
3624. Release of a prisoner.
3625. Inapplicability of the Administrative Procedure Act.

Subchapter C—Imprisonment

§ 3621. Imprisonment of a convicted person

(a) Commitment to Custody of Bureau of Prisons.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) Place of Imprisonment.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

(c) Delivery of Order of Commitment.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

(d) Delivery of Prisoner for Court Appearances.—The United States Marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

§ 3622. Temporary release of a prisoner

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

(1) visiting a relative who is dying;

(2) attending a funeral of a relative;

(3) obtaining medical treatment not otherwise available;

(4) contacting a prospective employer;

(5) establishing or reestablishing family or community ties; or

(6) engaging in any other significant activity consistent with the public interest;

(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

(2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

§ 3623. Transfer of a prisoner to State authority

The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if—

(1) the transfer has been requested by the Governor or other executive authority of the State;

(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

§ 3624. Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of thirty-six days at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made

within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten percent of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment. The term runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release, except that it does not run during any period in which the person is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a Federal, State, or local crime.

"§ 3625. Inapplicability of the Administrative Procedure Act

The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

CHAPTER 232—MISCELLANEOUS SENTENCING PROVISONS

Sec.

3661. Use of information for sentencing.
3662. Conviction records.
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3664. Procedure for issuing order of restitution.
3665. Firearms possessed by convicted felons.
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3667. Liquors and related property; definitions.
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3672. Duties of Director of Administrative Office of the United States Courts.
3673. Definitions for sentencing provisions.

§ [3577.] *3661.* Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropirate sentence.

§ [3578.] *3662.* Conviction records

(a) The Attorney General of the United States is authorized to establish in the Department of Justice a repository for records of convictions and determinations of the validity of such convictions.

(b) Upon the conviction thereafter of a defendant in court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court shall cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe.

(c) Records maintained in the repository shall not be public records. Certified copies thereof—

(1) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(2) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of a State, any political subdivision, or any department, agency, or instrumentality thereof, if a statute of such State requires that, upon the conviction of a defendant in a court of the State or any political subdivision thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe; and

(3) shall be prima facie evidence in any court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality

thereof, that the convictions occurred and whether they have been judicially determined to be invalid on collateral review.

(d) The Attorney General of the United States shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations under this section.

§ [3579] *3663*. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the Court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered,

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

[(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.]

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation, modify the term or conditions of supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

[(h) An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.]

(h) An order of restitution may be enforced by the United States in the manner provided in sections 3812 and 3813 or in the same manner as a judgment in a civil action, and by the victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

§ [3580.] *3664.* Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amont of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss substained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

§ [3611.] *3665.* Firearms possessed by convicted felons

A judgment of conviction for transporting a stolen motor vehicle in interstate or foreign commerce or for committing or attempting to commit a felony in violation of any law of the United States involving the use of threats, force, or violence or perpetrated in whole or in part by the use of firearms, may, in addition to the penalty provided by law for such offense, order the confiscation and disposal of firearms and ammunition found in the possession or under the immediate control of the defendant at the time of his arrest.

The court may direct the delivery of such firearms or ammunition to the law-enforcement agency which apprehended such person, for its use or for any other disposition in its discretion.

§ [3612.] *3666.* Bribe moneys

Moneys received or tendered in evidence in any United States Court, or before any officer thereof, which have been paid to or received by any official as a bribe, shall, after the final disposition of the case, proceeding or investigation, be deposited in the registry of the court to be disposed of in accordance with the order of the court, to be subject, however, to the provisions of section 2042 of Title 28.

§ [3615.] *3667.* Liquors and related property; definitions

All liquor involved in any violation of sections 1261–1265 of this title, the containers of such liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited and such property or its proceeds disposed of in accordance with the laws relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws.

As used in this section, "vessel" includes every description of watercraft used, or capable of being used, as a means of transportation in water or in water and air; "vehicle" includes animals and every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land or through the air.

§ [3617.] *3668.* Remission or mitigation of forfeitures under liquor laws; possession pending trial

(a) Jurisdiction of court

Whenever, in any proceeding in court for the forfeiture, under the internal-revenue laws, of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquors, such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

(b) Conditions precedent to remission or mitigation

In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any State relating to liquor, and (3) if it appears that the interest asserted by the claimant or arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.

(c) Claimants first entitled to delivery

Upon the request of any claimant whose claim for remission or mitigation is allowed and whose interest is first in the order of priority among such claims allowed in such proceeding and is of an amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to him; and, upon the joint request of any two or more claimants whose claims are allowed and whose interests are not subject to any prior or intervening interests claimed and allowed in such proceedings, and are of a total amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to such of the joint requesting claimants as is designated in such request. Such return shall be made only upon payment of all expenses incident to the seizure and forfeiture incurred by the United States. In all other cases the court shall order disposition of such vehicle or aircraft as provided in sections 304f–304m of Title 40, and if such disposition be by public sale, payment from the proceeds thereof, after satisfaction of all such expenses, of any such claim in its order of priority among the claims allowed in such proceedings.

(d) Delivery on bond pending trial

In any proceeding in court for the forfeiture under the internal-revenue laws of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquor, the court shall order delivery thereof to any claimant who shall establish his right to the immediate possession thereof, and shall execute, with one or more sureties approved by the court, and deliver to the court, a bond to the United States for the payment of a sum equal to the appraised value of such vehicle or aircraft. Such bond shall be conditioned to return such vehicle or aircraft at the time of the trial and to pay the difference between the appraised value of such vehicle or aircraft as of the time it shall have been so released on bond and the appraised value thereof as of the time of trial; and conditioned further that, if the vehicle or aircraft be not returned at the time of trial, the bond shall stand in lieu of, and be forfeited in the same manner as, such vehicle or aircraft. Notwithstanding this subsection or any other provisions of law relating to the delivery of possession on bond of vehicles or aircraft sought to be forfeited under the internal-revenue laws, the court may, in its discretion and upon good cause shown by the United States, refuse to order such delivery of possession.

§ [3618.] *3669.* Conveyances carrying liquor

Any conveyance, whether used by the owner or another in introducing or attempting to introduce intoxicants into the Indian country, or into other places where the introduction is prohibited by treaty or enactment of Congress, shall be subject to seizure, libel, and forfeiture.

§ [3619.] *3670.* Disposition of conveyances seized for violation of the Indian liquor laws

The provisions of section [3617] *3668* of this title shall apply to any conveyances seized, proceeded against by libel, or forfeited under the provisions of section 3113 or [3618] *3669* of this title for having been used in introducing or attempting to introduce intoxicants into the Indian country or into other places where such introduction is prohibited by treaty or enactment of Congress.

§ [3620.] *3671.* Vessels carrying explosives and steerage passengers

The amount of any fine imposed upon the master of a steamship or other vessel under the provisions of section 2278 of this title shall be a lien upon such vessel, and such vessel may be libeled therefor in the district court of the United States for any district in which such vessel shall arrive or from which it shall depart.

§ [3656.] *3672.* Duties of Director of the Administrative Office of the United States Courts

The Director of the Administrative Office of the United States Courts, or his authorized agent, shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of all probation officers.

He shall collect for publication statistical and other information concerning the work of the probation officers.

He shall prescribe record forms and statistics to be kept by the probation officers and shall formulate general rules for the proper conduct of the probation work.

He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts.

He shall, under the supervision and direction of the Judicial Conference of the United States, fix the salaries of probation officers and shall provide for their necessary expenses including clerical service and travel expenses.

He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts.

§ 3673. Definitions for sentencing provisions

As used in chapters 227 and 229—

(a) "found guilty" includes acceptance by a court of a plea of guilty or nolo contendere;

(b) "commission of an offense" includes the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense; and

(c) "law enforcement officer" means a public servant authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of an offense.

* * * * * * *

CHAPTER 235—APPEAL

Sec.

3731. Appeal by United States.
3732. Taking of appeal; notice; time—Rule.
3733. Assignment of errors—Rule.
3734. Bill of exceptions abolished—Rule.
3735. Bail on appeal or certiorari—Rule.
3736. Certiorari—Rule.
3737. Record—Rule.
3738. Docketing appeal and record—Rule.
3739. Supervision—Rule.
3740. Argument—Rule.
3741. Harmless error and plain error—Rule.
3742. Review of a sentence.

* * * * * * *

§ 3742. Review of a sentence

(a) Appeal By a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

(3) is greater than the sentence, if any, specified in a plea agreement under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure, and—

(A) is greater than the sentence specified in the applicable sentencing guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limited condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the maximum established in the guideline; or

(B) there is no guideline for any offense under the provision of law that the defendant was convicted of violating.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

(3) is less than the sentence, if any, specified in a plea agreement under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure, and—

(A) is less than the sentence specified in the applicable sentencing guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the minimum established in the guideline; or

(B) there is no guideline for any offense under the provision of law that the defendant was convicted of violating;

and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

(c) Record on Review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(d) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.

(c) Decision and Disposition.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, it shall—

(A) remand the case for further sentencing proceedings; or

(B) correct the sentence;

(2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and—

(i) remand the case for imposition of a lesser sentence;

"(ii) remand the case for further sentencing proceedings; or

(iii) impose a lesser sentence;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and—

(i) remand the case for imposition of a greater sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a greater sentence; or

(3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.

PART III—PRISONS AND PRISONERS

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CHAPTER 301—GENERAL PROVISIONS

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4010. Acquisition of additional land.
4011. Disposition of cash collections for meals, laundry, etc.

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§ 4004. Oaths and acknowledgments

The wardens and superintendents, associate wardens and superintendents, chief clerks, [record clerks, and parole officers] *and record clerks*, of Federal penal or correctional institutions, may administer oaths to and take acknowledgments of officers, employees, and inmates of such institutions, but shall not demand or accept any fee or compensation therefor.

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CHAPTER 305—COMMITMENT AND TRANSFER

Sec.

4081. Classification and treatment of prisoners.
4082. Commitment to Attorney General; residential treatment centers, extension of limits of confinement; work furlough.
4083. Penitentiary imprisonment; consent.
[4084. Copy of commitment delivered with prisoner.] *[4084. Repealed.]*
[4085. Transfer for state offense; expense.] *[4085. Repealed.]*
4086. Temporary safe-keeping of federal offenders by marshalls.

§ 4081. Classification and treatment of prisoners

The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

§ 4082. Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough

[(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

[(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.

[(c) The Attorney General may extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to—

[(1) visit a specifically designated place or places for a period not to exceed thirty days and return to the same or another institution or facility. An extension of limits may be granted to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services not otherwise available, the contacting of prospective employers, the establishment or reestablishment of family and community ties or for any other significant reason consistent with the public interest; or

[(2) work at paid employment or participate in a training program in the community on a voluntary basis while continuing as a prisoner of the institution or facility to which he is committed, provided that—

[(i) representatives of local union central bodies or similar labor union organizations are consulted;

[(ii) such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

[(iii) the rates of pay and other conditions of employment will not be less than those paid or provided for work of similar nature in the locality in which the work is to be performed.

A prisoner authorized to work at paid employment in the community under this subsection may be required to pay, and the Attorney General is authorized to collect, such costs incident to the prisoner's confinement as the attorney general deems appropriate and reasonable. Collections shall be deposited in the Treasury of the United States as miscellaneous receipts.]

[(d)] *(a)* The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from the custody of the Attorney General punishable as provided in chapter 35 of this title.

[(e) The authority conferred upon the Attorney General by this section shall extend to all persons committed to the National Training School for Boys.]

[(f)] *(b)* As used in this section—

the term "facility" shall include a residential community treatment center; and

the term "relative" shall mean a spouse, child (including stepchild, adopted child or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person who, though not a natural parent, has acted in the place of a parent), brother, or sister.

[§ 4084. Copy of commitment delivered with prisoner

[Whenever a prisoner is committed to a warden, sheriff or jailer by virtue of a writ, or warrant, a copy thereof shall be delivered to such officer as his authority to hold the prisoner, and the original shall be returned to the proper court or officer, with the officer's return endorsed thereon.]

[§ 4085. Transfer for state offense; expense

[(a) Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release, to be transferred to a penal or correctional institution within such State or District.

[If more than one such request is presented in respect to any prisoner, the Attorney General shall determine which request should receive preference.

[The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."

[(b) This section shall not limit the authority of the Attorney General to transfer prisoners pursuant to other provisions of law.]

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CHAPTER 306—TRANSFER TO OR FROM FOREIGN COUNTRIES

Sec.

4100. Scope and limitation of chapter.
4101. Definitions.
4102. Authority of the Attorney General.
4103. Applicability of United States laws.
4104. Transfer of offenders on probation.
4105. Transfer of offenders serving sentence of imprisonment.
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4109. Right to counsel, appointment of counsel.
4110. Transfer of juveniles.
4111. Prosecution barred by foreign conviction.
4112. Loss of rights, disqualification.
4113. Status of alien offender transferred to a foreign country.
4114. Return of transferred offenders.
4115. Execution of sentences imposing an obligation to make restitution or reparations.

* * * * * * *

§ 4101. Definitions

As used in this chapter the term—

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(f) "parole" means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority and to its supervision, *including a term of supervised release pursuant to section 3583;*

(g) "probation" means any form of a sentence [to a penalty of imprisonment the execution of which is suspended and] *under which* the offender is permitted to remain at liberty under supervision and subject to conditions for the breach of which [the suspended] *a* penalty of imprisonment may be ordered executed;

* * * * * * *

§ 4105. Transfer of offenders serving sentence of imprisonment

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(c)(1) The transferred offender shall be entitled to all credits for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer. Subsequent to the transfer, the offender shall in addition be entitled to credits [for good time] *toward service of sentence for satisfactory behavior,* computed on the basis of the time remaining to be served at the time of the transfer and at the rate provided in [section 4161] *section 3624(b)* of this title for a sentence of the length of the total sentence imposed and certified by the foreign authorities. These credits shall be combined to provide a release date for the offender pursuant to [section 4164] *section 3624(a)* of this title.

(2) If the country from which the offender is transferred does not give credit for good time, the basis of computing the deduction from the sentence shall be the sentence imposed by the sentencing court and certified to be served upon transfer, at the rate provided in [section 4161] *section 3624(b)* of this title.

[(3) A transferred offender may earn extra good time deductions, as authorized in section 4162 of this title, from the time of transfer.]

[(4) All credits toward service of the sentence, other than the credit for time in custody before sentencing, may be forfeited as provided in section 4165 of this title and may be restored by the Attorney General as provided in section 4166 of this title.]

(3) Credit toward service of sentence may be withheld as provided in section 3624(b) of this title.

[5] *(4)* Any sentence for an offense against the United States, imposed while the transferred offender is serving the sentence of imprisonment imposed in a foreign country, shall be aggregated with the foreign sentence, in the same manner as if the foreign sentence was one imposed by a United States district court for an offense against the United States.

§ 4106. Transfer of offenders on parole; parole of offenders transferred

(a) Upon the receipt of an offender who is on parole from the authorities of a foreign country, the Attorney General shall assign the offender to the United States [Parole Commission] *Probation System* for supervision.

[(b) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with reference to an offender transferred to the United States to serve a sentence of imprisonment or who at the time of transfer is on parole as they have with reference to an offender convicted in a court of the United States except as otherwise provided in this chapter or in the pertinent treaty. Sections 4201 through 4204; 4205(d), (e), and (h); 4206 through 4216; and 4218 of this title shall be applicable.]

(b) An offender transferred to the United States to serve a sentence of imprisonment shall be released pursuant to section 3624(a) of this title after serving the period of time specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1). He shall be released to serve a term of supervised release for any term specified in the applicable guideline. The provisions of section 3742 of this title apply to a sentence to a term of imprisonment under this subsection, and the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States has jurisdiction to review the period of imprisonment as though it had been imposed by the United States district court.

[(c) An offender transferred to the United States to serve a sentence of imprisonment may be released on parole at such time as the Parole Commission may determine.]

§ 4108. Verification of consent of offender to transfer to the United States

(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof, *including any term of imprisonment or term of supervised release specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1),* shall be verified in the country in which the sentence was imposed by a United States magistrate, or by a citizen specifically designated by a judge of the United States as defined in section 451 of title 28, United States Code. The designation of a citizen who is an employee or officer of a department or agency of the United States shall be with the approval of the head of that department or agency.

* * * * * * *

[CHAPTER 309—GOOD TIME ALLOWANCES

[Sec.

[4161. Computation generally.
[4162. Industrial good time.
[4163. Discharge.
[4164. Released prisoner as parolee.
[4165. Forfeiture for offense.
[4166. Restoration of forfeited commutation.]

[§ 4161. Computation generally

[Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

[Five days for each month, if the sentence is not less than six months and not more than one year.

[Six days for each month, if the sentence is more than one year and less than three years.

[Seven days for each month, if the sentence is not less than three years and less than five years.

[Eight days for each month, if the sentence is not less than five years and less than ten years.

[Ten days for each month, if the sentence is ten years or more.

[When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.]

[§ 4162. Industrial good time

[A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

[In the discretion of the Attorney General such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

[Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence.

[§ 4163. Discharge

[Except as hereinafter provided a prisoner shall be released at the expiration of his terms of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. If such release date falls on a holiday which falls other than on a Saturday, Sunday, or Monday, the prisoner may be released at the discretion of the warden or keeper on the day preceding the holiday.]

[§ 4164. Released prisoner as parolee

[A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

[This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.]

[§ 4165. Forfeiture for offense

[If during the term of imprisonment a prisoner commits any offense or violates the rules of the institution, all or any part of his earned good time may be forfeited.]

[§ 4166. Restoration of forfeited commutation

[The Attorney General may restore any forfeited or lost good time or such portion thereof as he deems proper upon recommendation of the Director of the Bureau of Prisons.]

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[CHAPTER 311—PAROLE

[Sec.

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[§ 4201. Definitions

[As used in this chapter—

[(1) "Commission" means the United States Parole Commission;

[(2) "Commissioner" means any member of the United States Parole Commission;

[(3) "Director" means the Director of the Bureau of Prisons;

[(4) "Eligible prisoner" means any Federal prisoner who is eligible for parole pursuant to this title or any other law including any Federal prisoner whose parole has been revoked and who is not otherwise ineligible for parole;

[(5) "Parolee" means any eligible prisoner who has been released on parole or deemed as if released on parole under section 4164 or section 4205(f); and

[(6) "Rules and regulations" means rules and regulations promulgated by the Commission pursuant to section 4203 and section 553 of title 5, United States Code.]

[§ 4202. Parole Commission created

[There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall be comprised of nine members appointed by the President, by and with the advice and consent of the Senate. The President shall designate from among the Commissioners one to serve as Chairman. The term of office of a Commissioner shall be six years, except that the term of a person appointed as a Commissioner to fill a vacancy shall expire six years from the date upon which such person was appointed and qualified. Upon the expiration of a term of office of a Commissioner, the Commissioner shall continue to act until a successor has been appointed and qualified, except that no Commissioner may serve in excess of twelve years. Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).]

[§ 4203. Powers and duties of the Commission

[(a) The Commission shall meet at least quarterly, and by majority vote shall—

[(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;

[(2) create such regions as are necessary to carry out the provisions of this chapter, but in no event less than five; and

[(3) ratify, revise, or deny any request for regular, supplemental, or deficiency appropriations, prior to the submission of the requests to the Office of Management and Budget by the Chairman, which requests shall be separate from those of any other agency of the Department of Justice.

[(b) The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to—

[(1) grant or deny an application or recommendation to parole any eligible prisoner;

[(2) impose reasonable conditions on an order granting parole;

[(3) modify or revoke an order paroling any eligible prisoner; and

[(4) request probation officers and other individuals, organizations, and public or private agencies to perform such duties with respect to any parolee as the Commission deems necessary for maintaining proper supervision of an assistance to such parolees; and so as to assure that no probation officers, individuals, organizations, or agencies shall bear excessive caseloads.

[(c) The Commission, by majority vote, and pursuant to rules and regulations—

[(1) may delegate to any Commissioner or commissioners powers enumerated in subsection (b) of this section;

[(2) may delegate to hearing examiners any powers necessary to conduct hearings and proceedings, take sworn testimony, obtain and make a record of pertinent information, make findings of probable cause and issue subpenas for witnesses or evidence in parole revocation proceedings, and recommend disposition of any matters enumerated in subsection (b) of this section, except that any such findings or recommendations shall be based upon the concurrence of not less than two hearing examiners;

[(3) may delegate authority to conduct hearings held pursuant to section 4214 to any officer or employee of the executive or judicial branch of Federal or State government; and

[(4) may review, or may delegate to the National Appeals Board the power to review, any decision made pursuant to subparagraph (1) of this subsection except that any such decision so reviewed must be reaffirmed, modified or reversed within thirty days of the date the decision is rendered, and, in case of such review, the individual to whom the decision applies shall be informed in writing of the Commission's actions with respect thereto and the reasons for such actions.

[(d) Except as otherwise provided by law, any action taken by the Commission pursuant to subsection (a) of this section shall be taken by a majority vote of all individuals currently holding office as members of the Commission which shall maintain and make available for public inspection a record of the final vote of each member on statements of policy and interpretations adopted by it. In so acting, each Commissioner shall have equal responsibility and authority, shall have full access to all information relating to the performance of such duties and responsibilities, and shall have one vote.]

[§ 4204. Powers and duties of the Chairman

[(a) The Chairman shall—

[(1) convene and preside at meetings of the Commission pursuant to section 4203 and such additional meetings of the Commission as the Chairman may call or as may be requested in writing by at least three Commissioners;

[(2) Appoint, fix the compensation of, assign, and supervise all personnel employed by the Commission except that—

[(A) the appointment of any hearing examiner shall be subject to approval of the Commission within the first year of such hearing examiner's employment; and

[(B) regional Commissioners shall appoint and supervise such personnel employed regularly and full time in their respective regions as are compensated at a rate up to and including grade 9 of the General Schedule pay rates (5 U.S.C. 5332);

[(3) assign duties among officers and employees of the Commission, including Commissioners, so as to balance the workload and provide for orderly administration;

[(4) direct the preparation of requests for appropriations for the Commission, and the use of funds made available to the Commission;

[(5) designate three Commissioners to serve on the National Appeals Board of whom one shall be so designated to serve as vice chairman of the Commission (who shall act as Chairman of the Commission in the absence or disability of the Chairman or in the event of the vacancy of the Chairmanship), and designate, for each such region established pursuant to section 4203, one Commissioner to serve as regional Commissioner in each such region; except that in each such designation the Chairman shall consider years of service, personal preference and fitness, and no such designation shall take effect unless concurred in by the President, or his designee;

[(6) serve as spokesman for the Commission and report annually to each House of Congress on the activities of the Commission; and

[(7) exercise such other powers and duties and perform such other functions as may be necessary to carry out the purposes of this chapter or as may be provided under any other provision of law.

[(b) The Chairman shall have the power to—

[(1) without regard to section 3648 of the Revised Statutes of the United States (31 U.S.C. 529), enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

[(2) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes of the United States (31 U.S.C. 665(b));

[(3) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

[(4) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the parole process;

[(5) carry out programs of research concerning the parole process to develop classification systems which describe types of offenders, and to develop theories and practices which can be applied to the different types of offenders;

[(6) publish data concerning the parole process;

[(7) devise and conduct, in various geographical locations, seminars, workshops and training programs providing continuing studies and instruction for personnel of Federal, State and local agencies and private and public organizations working with parolees and connected with the parole process; and

[(8) utilize the services, equipment, personnel, information, facilities, and instrumentalities with or without reimbursement therefor of other Federal, State, local and private agencies with their consent.

[(c) In carrying out his functions under this section, the Chairman shall be governed by the national parole policies promulgated by the Commission.]

[§ 4205. Time of eligibility for release on parole

[(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

[(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which even the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

[(c) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (d) of this section. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court with three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) place the offender on probation as authorized by section 3651; or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from the date of original commitment under this section.

[(d) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsections (a) or (b) of this section, the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall funish to the Commission a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The Commission may make such other investigation as it may deem necessary.

[(e) Upon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee and whenever not incompatible with the public interest, their views and recommendation with respect to any matter within the jurisdiction of the Commission.

[(f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

[(g) At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time an no hearing shall be required.

[(h) Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any provision of law.**]**

[§ 4206. Parole determination criteria

[(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

[(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

[(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

[(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

[(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided,* That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

[(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.]

[§ 4207. Information considered

[In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

[(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

[(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

[(3) presentence investigation reports;

[(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

[(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.]

[§ 4208. Parole determination proceeding; time

[(a) In making a determination under this chapter (relating to parole) the Commission shall conduct a parole determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsections (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be. An eligible prisoner may knowingly and intelligently waive any proceeding.

[(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly scheduled proceedings by the Commission at the institution in which the prisoner is confined.

[(c) Subparagraph (2) of subsection (b) shall not apply to—

[(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

[(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

[(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

[(d)(1) During the period prior to the parole determination proceeding as provided in subsection (b) of this section, a prisoner may consult, as provided by the director, with a representative as referred to in subparagraph (2) of this subsection, and by mail or otherwise with any person concerning such proceeding.

[(2) The prisoner shall, if he chooses, be represented at the parole determination proceeding by a representative who qualifies under rules and regulations promulgated by the Commission. Such rules shall not exclude attorneys as a class.

[(e) The prisoner shall be allowed to appear and testify on his own behalf at the parole determination proceeding.

[(f) A full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commission may retain of the proceeding.

[(g) If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to inhance his chance of being released at a subsequent proceeding.

[(h) In any case in which release on parole is not granted, subsequent parole determination proceedings shall be held not less frequently than:

[(1) eighteen months in the case of a prisoner with a term or terms of more than one year but less than seven years; and

[(2) twenty-four months in the case of a prisoner with a term or terms of seven years or longer.]

§ 4209. Conditions of parole

[(a) In every case, the Commission shall impose as a condition of parole that the parolee not commit another Federal, State, or local crime. The Commission may impose or modify other conditions of parole to the extent that such conditions are reasonably related to—

[(1) the nature and circumstances of the offense; and

[(2) the history and characteristics of the parolee;

and may provide for such supervision and other limitations as are reasonable to protect the public welfare.

[(b) The conditions of parole should be sufficiently specific to serve as a guide to supervision and conduct, and upon release on parole the parolee shall be given a certificate setting forth the conditions of his parole. An effort shall be made to make certain that the parolee understands the conditions of his parole.

[(c) Release on parole or release as if on parole may as a condition such release require—

[(1) a parolee to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of such parole;

[(2) a parolee, who is an addict within the meaning of section 4251(a), or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), to participate in the community supervision programs authorized by section 4255 for all or part of the period of parole.

A parolee residing in a residential community treatment center pursuant to subparagraph (1) or (2) of this subsection, may be required to pay such costs incident to residence as the Commission deems appropriate.

[(d)(1) The Commission may modify conditions of parole pursuant to this section on its own motion, or on the motion of a United States probation officer supervising a parolee: *Provided*, That the parolee receives notice of such action and has ten days after receipt of such notice to express his views on the proposed modification. Following such ten-day period, the Commission shall have twenty-one days, exclusive of holidays, to act upon such motion or application.

[(2) A parolee may petition the Commission on his own behalf for a modification of conditions pursuant to this section.

[(3) The provisions of this subsection shall not apply to modifications of parole conditions pursuant to a revocation proceeding under section 4214.]

[§ 4210. Jurisdiction of Commission

[(a) A parolee shall remain in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which such parolee was sentenced.

[(b)Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that—

[(1) such jurisdiction shall terminate at an earlier date to the extent provided under section 4164 (relating to mandatory release) or section 4211 (relating to early termination of parole supervision), and

[(2) in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214 (b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

[(c) In the case of any parolee found to have intentionally refused or failed to respond to any reasonable request, order, summons, or warrant of the Commission or any member or agent thereof, the jurisdiction of the Commission may be extended for the period during which the parolee so refused or failed to respond.

[(d) The parole of any parolee shall run concurrently with the period of parole or probation under any other Federal, State, or local sentence.

[(e) The parole of any prisoner sentenced before June 29, 1932, shall be for the remainder of the term or terms specified in his sentence, less good time allowances provided by law.

[(f) Upon the termination of the jurisdiction of the Commission over any parolee, the Commission shall issue a certificate of discharge to such parolee and to such other agencies as it may determine.]

[§ 4211. Early termination of parole

[(a) Upon its own motion or upon request of the parolee, the Commission may terminate supervision over a parolee prior to the termination of jurisdiction under section 4210.

[(b) Two years after each parolee's release on parole, and at least annually thereafter, the Commission shall review the status of the parolee to determine the need for continued supervision. In calculating such two-year period there shall not be included any period of release on parole prior to the most recent such release, nor any period served in confinement on any other sentence.

[(c)(1) Five years after each parolee's release on parole, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing conducted in accordance with the procedures prescribed in section 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law.

[(2) If supervision is not terminated under subparagraph (1) of this subsection the parolee may request a hearing annually thereafter, and a hearing, with procedures as provided in subparagraph (1) of this subsection shall be conducted with respect to such termination of supervision not less frequently than biennially.

[(3) In calculating the five-year period referred to in subparagraph (1), there shall not be included any period of release on parole prior to the most recent such release, nor any period served in confinement on any other sentence.]

[§ 4212. Aliens

[When an alien prisoner subject to deportation becomes eligible for parole, the Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States.

[Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.]

[§ 4213. Summons to appear or warrant for retaking of parolee

[(a) If any parolee is alleged to have violated his parole, the Commission may—

[(1) summon such parolee to appear at a hearing conducted pursuant to section 4214; or

[(2) issue a warrant and retake the parolee as provided in this section.

[(b) Any summons or warrant issued under this section shall be issued by the Commission as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary. Imprisonment in an institution shall not be deemed grounds for delay of such issuance, except that, in the case of any parolee charged with a criminal offense, issuance of a summons or warrant may be suspended pending disposition of the charge.

[(c) Any summons or warrant issued pursuant to this section shall provide the parolee with written notice of—

[(1) the conditions of parole he is alleged to have violated as provided under section 4209;

[(2) his rights under this chapter; and

[(3) the possible action which may be taken by the Commission

[(d) Any officer of any Federal penal or correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant issued under this section is delivered, shall execute such warrant by taking such parolee and returning him to the custody of the regional commissioner, or to the custody of the Attorney General, if the Commission shall so direct.]

[§ 4214. Revocation of parole

[(a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or retaken under section 4213 shall be accorded the opportunity to have—

[(A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which shall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:

[(i) continuation of revocation proceedings is not warranted; or

[(ii) incarceration of the parolee pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations;

[(iii) the parolee is not likely to fail to appear for further proceedings; and

[(iv) the parolee does not constitute a danger to himself or others.

[(B) Upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing.

[(2) Hearings held pursuant to subparagraph (1) of this subsection shall be conducted by the Commission in accordance with the following procedures:

[(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

[(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation.

[(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

[(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

For the purposes of subparagraph (1) of this subsection, the Commission may subpena witnesses and evidence, and pay witness fees as established for the courts of the United States. If a person refuses to obey such a subpena, the Commission may petition a court of the United States for the judicial district in which such parole proceeding is being conducted, or in which such person may be found, to request such person to attend, testify, and produce evidence. The court may issue an order requiring such person to appear before the Commission, when the court finds such information, thing, or testimony directly related to a matter with respect to which the Commission is empowered to make a determination under this section. Failure to obey such an order is punishable by such court as a contempt. All process in such a case may be served in the judicial district in which such a parole proceeding is being conducted, or in which such person may be found.

[(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application.

[(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify in his own behalf, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

[(3) Following the disposition review, the Commission may:

[(A) let the detainer stand; or

[(B) withdraw the detainer.

[(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

[(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may take any of the following actions:

[(1) restore the parolee to supervision;

[(2) reprimand the parolee;

[(3) modify the parolee's conditions of the parole;

[(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or

[(5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

[(e) The Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If parole is revoked, a digest shall be prepared by the Commission setting forth in writing the factors considered and reasons for such action, a copy of which shall be given to the parolee.]

[§ 4215. Reconsideration and appeal

[(a) Whenever parole release is denied under section 4206, parole conditions are imposed or modified under section 4209, parole discharge is denied under section 4211(c), or parole is modified or revoked under section 4214, the individual to whom any such decision applies may have the decision reconsidered by submitting a written application to the regional commissioner not later than thirty days following the date on which the decision is rendered. The regional commissioner, upon receipt of such application, must act pursuant to rules and regulations within thirty days to reaffirm, modify, or reverse his original decision and shall inform the applicant in writing of the decision and the reasons therefor.

[(b) Any decision made pursuant to subsection (a) of this section which is adverse to the applicant for reconsideration may be appealed by such individual to the National Appeals Board by submitting a written notice of appeal not later than thirty days following the date on which such decision is rendered. The National Appeals Board, upon receipt of the appellant's papers, must act pursuant to rules and regulations within sixty days to reaffirm, modify, or reverse the decision and shall inform the appellant in writing of the decision and the reasons therefor.

[(c) The National Appeals Board may review any decision of a regional commissioner upon the written request of the Attorney General filed not later than thirty days following the decision and, by majority vote, shall reaffirm, modify, or reverse the decision within sixty days of the receipt of the Attorney General's request. The Board shall inform the Attorney General and the individual to whom the decision applies in writing of its decision and the reasons therefor.]

[§ 4216. Young adult offenders

[In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C., chap. 402) sentence may be imposed pursuant to the provisions of such Act.]

[§ 4217. Warrants to retake Canal Zone parole violators

[An officer of a Federal penal or correctional institution, or a Federal officer authorized to serve criminal process within the United States, to whom a warrant issued by the Governor of the Canal Zone for the retaking of a parole violator is delivered, shall execute the warrant by taking the prisoner and holding him for delivery to a representative of the Governor of the Canal Zone for return to the Canal Zone.]

[§ 4218. Applicability of Administrative Procedure Act

[(a) For purposes of the provisions of chapter 5 of title 5, United States Code, other than sections 554, 555, 556, and 557, the Commission is an "agency" as defined in such chapter.

[(b) For purposes of subsection (a) of this section, section 553(b)(3)(A) of title 5, United States Code, relating to rulemaking, shall be deemed not to include the phrase "general statements of policy".

[(c) To the extent that actions of the Commission pursuant to section 4203(a)(1) are not in accord with the provisions of section 553 of title 5, United States Code, they shall be reviewable in accordance with the provisions of sections 701 through 706 of title 5, United States Code.

[(d) Actions of the Commission pursuant to paragraphs (1), (2), and (3) of section 4203(b) shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5, United States Code.]

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[CHAPTER 314—NARCOTIC ADDICTS

[Sec.
[4251. Definitions.
[4252. Examination.
[4253. Commitment.
[4254. Conditional release.
[4255. Supervision in the community.]

[§ 4251. Definitions

[As used in this chapter—

[(a) "Addict" means any individual who habitually uses any narcotic drug as defined in section 102(16) of the Controlled Substances Act so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction.

[(b) "Crime of violence" includes voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or an attempt or conspiracy to commit any of the foregoing offenses.

[(c) "Treatment" includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by eliminating his dependence on addicting drugs, or by controlling his dependence, and his susceptibility to addiction.

[(d) "Felony" includes any offense in violation of a law of the United States classified as a felony under section 1 of title 18 of the United State Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a felony by the law of the place where that offense was committed.

[(e) "Conviction" and "convicted" mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory.

[(f) "Eligible offender" means any individual who is convicted of an offense against the United States, but does not include—

[(1) an offender who is convicted of a crime of violence.

[(2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

[(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided,* That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

[(4) an offender who has been convicted of a felony on two or more prior occasions.

[(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions.]

[§ 4252. Examination

[If the court believes that an eligible offender is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. The Attorney General shall report to the court within thirty days; or any additional period granted by the court, the results of such examination and make any recommendations he deems desirable. An offender shall receive full credit toward the service of his sentence for any time spent in custody for an examination.]

[§ 4253. Commitment

[(a) Following the examination provided for in section 4252, if the court determines that an eligible offender is an addict and is likely to be rehabilitated through treatment, it shall commit him to the custody of the Attorney General for treatment under this chapter, except that no offender shall be committed under this chapter if the Attorney General certifies that adequate facilities or personnel for treatment are unavailable. Such commitment shall be for an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed.

[(b) If, following the examination provided for in section 4252, the court determines that an eligible offender is not an addict, or is an addict not likely to be rehabilitated through treatment, it shall impose such other sentence as may be authorized or required by law.]

[§ 4254. Conditional release

[An offender committed under section 4253(a) may not be conditionally released until he has been treated for six months following such commitment in an institution maintained or approved by the Attorney General for treatment. The Attorney General may then or at any time thereafter report to the Board of Parole whether the offender should be conditionally released under supervision. After receipt of the Attorney General's report, and certification from the Surgeon General of the Public Health Service that the offender has made sufficient progress to warrant his conditional release under supervision, the Board may in its discretion order such a release. In determining suitability for release, the Board may make any investigation it deems necessary. If the Board does not conditionally release the offender, or if a conditional release is revoked, the Board may thereafter grant a release on receipt of a further report from the Attorney General.]

[§ 4255. Supervision in the community

[An offender who has been conditionially released shall be under the jurisdiction of the United States Parole Commission as if on parole, pursuant to chapter 311 of this title.

[The Director of the Administrative Office of the United States Courts may contract with any appropriate public or private agency or any person for supervisory aftercare of an offender. The Director may negotiate and award such contracts without regard to section 3709 of the Revised Statutes (41 U.S.C. 5).]

CHAPTER 315—DISCHARGE AND RELEASE PAYMENTS

Sec.
[4281. Discharge from prison.] *[4281. Repealed.]*
4282. Arrested but unconvicted persons.
[4283. Probation.] *[4283. Repealed.]*
[4284. Advances for rehabilitation.] *[4284. Repealed.]*
4285. Persons released pending further judicial proceedings.

[§ 4281. Discharge from prison

[A person convicted under the laws of the United States shall, upon discharge from imprisonment, or release on parole, be furnished with transportation to the place of conviction or bona fide residence within the United States at the time of his commitment or to such place within the United States as may be authorized by the Attorney General.

[He shall also be furnished with such suitable clothing as may be authorized by the Attorney General, and, in the discretion of the Attorney General, an amount of money not to exceed $100.]

* * * * * * *

[§ 4283. Probation

[A court of the United States when placing a defendant on probation, may direct the United States marshal to furnish the defendant with transportation to the place to which the defendant is required to proceed under the terms of his probation, and, in addition, may also direct the marshal to furnish the defendant with an amount of money, not to exceed $30, for subsistence expense to his destination. In such event, such expenses shall be paid by the marshal.]

[§ 4284. Advances for rehabilitation

[(a) The Attorney General, under such regulations as he prescribes, acting for himself or through such officers and employees as he designates, may use so much of the trust funds designated as "Commissary Funds, Federal Prisons" (31 U.S.C. 725s(22)), as may be surplus to other needs of the trust, to provide advances to prisoners at the time of their release, as an aid to their rehabilitation.

[(b) An advance made hereunder shall in no instance exceed $150 except with the specific approval of the Attorney General, and shall in every case be secured by the personal note of the prisoner conditioned to make repayment monthly when employed, or otherwise possessed of funds, with interest at a rate not to exceed 6 percentum per annum and subject to an agreement on the part of the prisoner that the funds so advanced shall be expended only for the purposes designated in the loan agreement. Repayments of principal and interest shall be credited to the trust fund from which the advance was made. Any unpaid principal or interest on said note shall be considered as a debt due the United States.]

CHAPTER 317—INSTITUTIONS FOR WOMEN

Sec.
4321. Board of Advisers.

§ 4321. Board of Advisers

Four citizens of the United States of prominence and distinction, appointed by the President to serve without compensation, for terms of four years, together with the Attorney General of the United States, the Director of the Bureau of Prisons and the warden of the Federal Reformatory for Women, shall constitute a Board of Advisers of said Federal Reformatory for Women, which shall recommend ways and means for the discipline and training of the inmates, to fit them for suitable employment upon their [parole or] discharge.

Any person chosen to fill a vacancy shall be appointed only for the unexpired term of the citizen whom he shall succeed.

CHAPTER 319—NATIONAL INSTITUTE OF CORRECTIONS

Sec.
4351. Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers.[1]
4352. Authority of Institute; report to President and Congress; time; records of recipients; access; scope of section.[1]
4353. Authorization of appropriations.[1]

[1] Section catchlines in analysis editorially supplied.

§ 4351. Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers[1]

(a) There is hereby established within the Bureau of Prisons a National Institute of Corrections.

(b) The overall policy and operations of the National Institute of Corrections shall be under the supervision of an Advisory Board. The Board shall consist of sixteen members. The following six individuals shall serve as members of the Commission ex officio: the

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[1] Section catchline editorially supplied.

Director of the Federal Bureau of Prisons or his designee, the Administrator of the Law Enforcement Assistance Administration or his designee, Chairman of the United States [Parole Board] *Sentencing Commission* or his designee, the Director of the Federal Judicial Center or his designee, the Associate Administrator for the Office of Juvenile Justice and Delinquency Prevention or his designee, and the Assistant Secretary for Human Development of the Department of Health, Education, and Welfare or his designee.

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PART IV—CORRECTION OF YOUTHFUL OFFENDERS

Chapter Sec.
401. General provisions 5001
[402. Federal Youth Corrections Act..........5005] *[402. Repealed.]*
403. Juvenile delinquency 5031

CHAPTER 401—GENERAL PROVISIONS

Sec.
5001. Surrender to State authorities; expenses.
5002. Advisory Corrections Council.
5003. Custody of State offenders.

* * * * * * *

§ 5002. Advisory Corrections Council

There is hereby created an Advisory Corrections Council, composed of one United States circuit judge and two United States district judges designated from time to time by the Chief Justice of the United States, of one member, who shall be Chairman, designated by the Attorney General, and, ex officio, of the Chairman of the [Board of Parole, the Chairman of the Youth Division,] *United States Sentencing Commission,* the Director of the Bureau of Prisons, and the Chief of Probation of the Administrative Office of the United States Courts. The Council shall hold stated meetings to consider problems of treatment and correction of all offenders against the United States and shall make such recommendations to the Congress, the President, the Judicial Conference of the United States, and other appropriate officials as may improve the administration of criminal justice and assure the coordination and integration of policies respecting the disposition, treatment, and correction of all persons convicted of offenses against the United States. It shall also consider measures to promote the prevention of crime and delinquency, suggest appropriate studies in this connection to be undertaken by agencies both public and private. The members of the Council shall serve without compensation but necessary travel and subsistence expenses as authorized by law shall be paid from available appropriations of the Department of Justice.

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[CHAPTER 402—FEDERAL YOUTH CORRECTIONS ACT

[Sec.
[5005. Youth correction decisions.
[5006. Definitions.

[[5007 to 5009. Repealed.]
[5010. Sentence.
[5011. Treatment.
[5012. Certificate as to availability of facilities.
[5013. Provision of facilities.
[5014. Classification studies and reports.
[5015. Powers of Director as to placement of youth offenders.
[5016. Reports concerning offenders.
[5017. Release of youth offenders.
[5018. Revocation of Commission orders.
[5019. Supervision of released youth offenders.
[5020. Apprehension of released offenders.[1]
[5021. Certificate setting aside conviction.
[5022. Applicable date.
[5023. Relationship to Probation and Juvenile Delinquency Acts.
[5024. Where applicable.
[5025. Applicability to the District of Columbia.
[5026. Parole of other offenders not affected.

[[1] So in original. Item does not conform to section catchline.

[§ 5005. Youth correction decisions

[The Commission and, where appropriate, its authorized representatives as provided in section 4203(c), may grant or deny any application or recommendation for conditional release, or modify or revoke any order of conditional release, of any person sentenced pursuant to this chapter, and perform such other duties and responsibilities as may be required by law. Except as otherwise provided, decisions of the Commission shall be made in accordance with the procedures set out in chapter 311 of this title.]

[§ 5006. Definitions

[As used in this chapter—

[(a) "Commission" means the United States Parole Commission;

[(b) "Bureau" means the Bureau of Prisons;

[(c) "Director" means the Director of the Bureau of Prisons;

[(d) "youth offender" means a person under the age of twenty-two years at the time of conviction;

[(e) "committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to sections 5010(b) and 5010(c) of this chapter;

[(f) "treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders; and

[(g) "conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.]

[[§§ 5007 to 5009. Repealed. Pub. L. 94-233, § 5, Mar. 15, 1976, 90 Stat. 231]]

[§ 5010. Sentence

[(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

[(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

[(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

[(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

[(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings.]

[§ 5011. Treatment

[Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment.]

[§ 5012. Certificate as to availability of facilities

[No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided.]

[§ 5013. Provison of facilities

[The Director may contract with any appropriate public or private agency not under his control for the custody, care, subsistence, education, treatment, and training of committed youth offenders the cost of which may be paid from the appropriation for "Support of United States Prisoners".]

[§ 5014. Classification studies and reports

[The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period of thirty days. The agency shall promptly forward to the Director and to the Commission a report of its findings with respect to the youth offender and its recommendations as to his treatment. As soon as practicable after commitment, the youth offender shall receive a parole interview.]

[§ 5015. Powers of Director as to placement of youth offenders

[(a) On receipt of the report and recommendations from the classification agency the Director may—

[(1) recommend to the Commission that the committed youth offender be released conditionally under supervision; or

[(2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or

[(3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

[(b) The Director may transfer at any time a committed youth offender from one agency or institution to any other agency or institution.]

[§ 5016. Reports concerning offenders

[The Director shall cause periodic examinations and reexaminations to be made of all committed youth offenders and shall report to the Commission as to each such offender as the Commission may require. United States probation officers and supervisory agents shall likewise report to the Commission respecting youth offenders under their supervision as the Commission may direct.]

[§ 5017. Release of youth offenders

[(a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission.

[(b) The Commission may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

[(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

[(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

[(e) Commutation of sentence authorized by any Act of Congress shall not be granted as a matter of right to committed youth offenders but only in accordance with rules prescribed by the Director with the approval of the Commission.]

[§ 5018. Revocation of Commission orders

[The Commission may revoke or modify any of its previous orders respecting a committed youth offender except an order of unconditional discharge.]

[§ 5019. Supervision of released youth offenders

[Committed youth offenders permitted to remain at liberty under supervision or conditionally released shall be under the supervision of United States probation officers, supervisory agents appointed by the Attorney General, and voluntary supervisory agents approved by the Commission. The Commission is authorized to encourage the formation of voluntary organizations composed of members who will serve without compensation as voluntary supervisory agents and sponsors. The powers and duties of voluntary supervisory agents and sponsors shall be limited and defined by regulations adopted by the Commission.]

[§ 5020. Apprehension of released offenders

[If, at any time before the unconditioned discharge of a committed youth offender, the Commission is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility the Commission may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youthful offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States marshal, or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given a revocation hearing by the Commission.]

[§ 5021. Certificate setting aside conviction

[(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

[(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.]

[§ 5022. Applicable date

[This chapter shall not apply to any offense committed before its enactment.]

[§ 5023. Relationship to Probation and Juvenile Delinquency Acts

[(a) Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title or the Act of June 25, 1910 (ch. 433, 36 Stat. 864), as amended (ch. 1, title 24, of the D. of C. Code), both relative to probation.

[(b) Nothing in this chapter shall be construed in any wise to amend, repeal, or affect the provisions of chapter 403 of this title (the Federal Juvenile Delinquency Act), or limit the jurisdiction of the United States courts in the administration and enforcement of that chapter except that the powers as to parole of juvenile delinquents shall be exercised by the Division.

[(c) Nothing in this chapter shall be construed in any wise to amend, repeal, or affect the provisions of the Juvenile Court Act of the District of Columbia (ch. 9, title 11, of the D. of C. Code).]

[§ 5024. Where applicable

[This chapter shall apply in the States of the United States and in the District of Columbia.]

[§ 5025. Applicability to the District of Columbia

[(a) The Commissioner of the District of Columbia is authorized to provide facilities and personnel for the treatment and rehabilitation of youth offenders convicted of violations of any law of the United States applicable exclusively to the District of Columbia or to contract with the Director of the Bureau of Prisons for their treatment and rehabilitation, the cost of which may be paid from the appropriation for the District of Columbia.

[(b) When facilities of the District of Columbia are utilized by the Attorney General for the treatment and rehabilitation of youth offenders convicted of violations of laws of the United States not applicable exclusively to the District of Columbia, the cost shall be paid from the "Appropriation for Support of United States Prisoners".

[(c) All youth offenders committed to institutions of the District of Columbia shall be under the supervision of the Commissioner of the District of Columbia, and he shall provide for their maintenance, treatment, rehabilitation, supervision, conditional release, and discharge in conformity with the objectives of this chapter.]

[§ 5026. Parole of other offenders not affected

[Nothing in this chapter shall be construed as repealing or modifying the duties, power, or authority of the Board of Parole, or of the Board of Parole of the District of Columbia, with respect to the parole of United States prisoners, or prisoners convicted in the

District of Columbia, respectively, not held to be committed youth offenders or juvenile delinquents.]

CHAPTER 403—JUVENILE DELINQUENCY

Sec.

5031. Definitions.
5032. Delinquency proceedings in district courts; transfer for criminal prosecution.
5033. Custody prior to appearance before magistrate.
5034. Duties of magistrate.
5035. Detention prior to disposition.
5036. Speedy trial.
5037. Dispositional hearing.
5038. Use of juvenile records.
5039. Commitments.
5040. Support.
[5041. Parole.] *[5041. Repealed.]*
[5042. Revocation of parole or probation.] *[5042. Revocation of Probation.]*

* * * * * * *

§ 5037. Dispositional hearing

[(a) If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than twenty court days after trial unless the court has ordered further study in accordance with subsection (c). Copies of the presentence report shall be provided to the attorneys for both the juvenile and the Government a reasonable time in advance of the hearing.

[(b) The court may suspend the adjudication of delinquency or the disposition of the delinquent on such conditions as it deems proper, place him on probation, or commit him to the custody of the Attorney General. Probation, commitment, or commitment in accordance with subsection (c) shall not extend beyond the juvenile's twenty-first birthday or the maximum term which could have been imposed on an adult convicted of the same offense, whichever is sooner, unless the juvenile has attained his nineteenth birthday at the time of disposition, in which case probation, commitment, or commitment in accordance with subsection (c) shall not exceed the lesser of two years or the maximum term which could have been imposed on an adult convicted of the same offense.]

(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (e). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend—

(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

(A) the date when the juvenile becomes twenty-one years old; or

(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult; or

(2) in the case of a juvenile who is between eighteen and twenty-one years old, beyond the lesser of—

(A) three years; or

(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3564, and 3565 are applicable to an order placing a juvenile on probation.

(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

(A) the date when the juvenile becomes twenty-one years old; or

(B) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult; or

(2) in the case of a juvenile who is between eighteen and twenty-one years old—

(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

(B) in any other case beyond the lesser of—

(i) three years; or

(ii) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult.

[(c)**]** *(d)* If the court desires more detailed information concerning an alleged or adjudicated delinquent, it may commit him, after notice and hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency. Such observation and study shall be conducted on an out-patient basis, unless the court determines that in patient observation and study are necessary to obtain the desired information. In the case of an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and his attorney. The agency shall make a complete study of the alleged or adjudicated delinquent to ascertain his personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other relevant factors. The Attorney General shall submit to the court and the attorneys for the juvenile and the Government the results of the study within thirty days after the commitment of the juvenile, unless the court grants additional time.

* * * * * * *

[§ 5041. Parole

[A juvenile delinquent who has been committed may be released on parole at any time under such conditions and regulations as the United States Parole Commission deems proper in accordance with the provisions in section 4206 of this title.]

§ 5042. Revocation of [parole or] probation

Any juvenile [parolee or] probationer shall be accorded notice and a hearing with counsel before his [parole or] probation can be revoked.

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FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

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* * * * * * * *

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VII. JUDGMENT

Rule 32. Sentence and Judgment

(a) Sentence.

[(1) IMPOSITION OF SENTENCE.—Sentence shall be imposed without unreasonable delay. Before imposing sentence, the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.]

(1) IMPOSITION OF SENTENCE.—Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) NOTIFICATION OF RIGHT TO APPEAL.—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal, *including any right to appeal the sentence,* and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed follow-

ing a plea of guilty or nolo contendere, *except that the court shall advise the defendant of any right to appeal his sentence.* If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

* * * * * * *

(c) Presentence Investigation

(1) WHEN MADE.—[The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.] *A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.*

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

[(2) REPORT.—The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.]

(2) REPORT.—The report of the presentence investigation shall contain—

(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) DISCLOSURE.—

(A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation **[**exclusive of any recommendation as to sentence**]**, *including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, but not to the* extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

* * * * * * *

(D) If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuarcy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons **[**or the Parole Commission**]**.

* * * * * * *

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons **[**or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c)**]** *pursuant to 18 U.S.C. § 3552(b)* shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) PLEA WITHDRAWAL.—If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, **[**imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c),**]** the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

* * * * * * *

[Rule 35. Correction or Reduction of Sentence

[(a) CORRECTION OF SENTENCE.—The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

[(b) REDUCTION OF SENTENCE.—The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.]

Rule 35. Correction of Sentence

(a) CORRECTION OF A SENTENCE ON REMAND.—The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—

(1) for imposition of a sentence in accord with the findings of the court of appeals; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

(b) CORRECTION OF SENTENCE FOR CHANGED CIRCUMSTANCES.—The court, on motion of the government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

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VIII. APPEAL

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Rule 38. Stay of execution[, and Relief Pending Review]

[(a) STAY OF EXECUTION.]

[1] *(a)* DEATH.—A sentence of death shall be stayed if an appeal is taken *from the conviction or sentence.*

[2] *(b)* IMPRISONMENT.—A sentence of imprisonment shall be stayed if an appeal is taken *from the conviction or sentence* and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Precedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is to be heard,

for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals.

[3] *(c)* Fine.—A sentence to pay a fine [or a fine and costs], if an appeal is taken, may be stayed by the district court or be the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine [and costs] in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

[(4) Probation.—An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed the court shall fix the terms of the stay.]

(d) Probation.—A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.

[(b) [Abrogated]]

[(c) [Abrogated]]

(e) Criminal Forfeiture, Notice to Victims, and Restitution.—A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3554, 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

(f) Disabilities.—A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.

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IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Commitment to Another District

(a) Appearance Before Federal Magistrate.—* * *

* * * * * * *

(d) Arrest of Probationer.—If a person is arrested for a violation of his probation in a district other than the district having probation jurisdiction, he shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed under Rule 32.1 if jurisdiction over the probationer is transferred to that district pursuant to 18 U.S.C. § [3653] *3605*;

* * * * * * *

RULE 54. APPLICATION AND EXCEPTION

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(c) APPLICATION OF TERMS.—* * *

* * * * * * *

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Grade" includes the issue whether, for the purposes of section 3571 (Sentence of Fine), a misdemeanor resulted in the loss of human life.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

* * * * * * *

["Petty offense" is defined in 18 U.S.C. [§ 1(3).]

"Petty offense" means a class B or C misdemeanor or an infraction.

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COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

PUBLIC LAW 91-513; 84 STAT. 1236

* * * * * * *

TITLE II—CONTROL AND ENFORCEMENT

PART D—OFFENSES AND PENALTIES

Sec. 401. Prohibited acts A—penalties.
Sec. 402. Prohibited acts B—penalties.
Sec. 403. Prohibited acts C—penalties.
Sec. 404. Penalty for simple possession; conditional discharge and expunging of records for first offense.
Sec. 405. Distribution to persons under age twenty-one.
Sec. 406. Attempt and conspiracy.
Sec. 407. Additional penalties.
Sec. 408. Continuing criminal enterprise.
[Sec. 409. Dangerous special drug offender sentencing.]
Sec. 410. Information for sentencing.
Sec. 411. Proceedings to establish previous convictions.

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TITLE III—IMPORTATION AND EXPORTATION; AMENDMENTS AND REPEALS OF REVENUE LAWS

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PART A—IMPORTATION AND EXPORTATION

* * * * * * *

Sec. 1010. Prohibited acts A—penalties.
Sec. 1011. Prohibited acts B—penalties.
Sec. 1012. Second or subsequent offenses.
Sec. 1013. Attempt and conspiracy.
Sec. 1014. Additional penalties.
Sec. 1015. Applicability of part E of title II.
Sec. 1016. Authority of Secretary of Treasury.

* * * * * * *

PART D—OFFENSES AND PENALTIES

PROHIBITED ACTS A—PENALTIES

SEC. 401. (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

* * * * * * *

(b) Except as otherwise provided in section 405, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. [Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.]

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of an controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. [Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.]

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. [Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.]

* * * * * * *

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in [subsections (a) and (b) of] section 404 *and section 3607 of title 18, United States Code.*

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. [Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.]

* * * * * * *

[(c) A special parole term imposed under this section or section 405 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 shall be in addition to, and not in lieu of, any other parole provided for by law.]

* * * * * * *

PENALTY FOR SIMPLE POSSESSION; CONDITIONAL DISCHARGE AND EXPUNGING OF RECORDS FOR FIRST OFFENSE

SEC. 404. [(a)] It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

[(b) (1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this title or title III, or any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part for second subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

[(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty-one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of prejury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.】

DISTRIBUTION TO PERSONS UNDER AGE TWENTY-ONE

SEC. 405. (a) Any person at least eighteen years of age who violates section 401(a)(1) by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) (punishable by 【(1)】 a term of imprisonment, or a fine, or both, up to twice that authorized by section 401(b)【, and (2) at least twice any special parole term authorized by section 401(b), for a first offense involving the same controlled substance and schedule】.

(b) Any person at least eighteen years of age who violates section 401(a)(1) by distributing a controlled substance to a person under twenty-one years of age after a prior conviction or convictions under subsection (a) of this section (or under section 303(b)(2) of the Federal Food, Drug, and Cosmetic Act as in effect prior to the effective date of section 701(b) of this Act) have become final, is punishable by 【(1)】 a term of imprisonment , or a fine, or both, up to three times that authorized by section 401(b)【, and (2) at least three times any special parole term authorized by section 401(b), for a second or subsequent offense involving the same controlled substance and schedule】.

* * * * * * *

CONTINUING CRIMINAL ENTERPRISE

SEC. 408. (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

* * * * * * *

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, 【and section 4202 of title 18 of the

United States Code] and the Act of July 15, 1932 (D.C. Code, secs. 24-203—24-207), shall not apply.

[DANGEROUS SPECIAL DRUG OFFENDER SENTENCING

[SEC. 409. (a) Whenever a United States attorney charged with the prosecution of a defendant in a court of the United States for an alleged felonious violation of any provision of this title or title III committed when the defendant was over the age of twenty-one years has reasons to believe that the defendant is a dangerous special drug offender such United States attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special drug offender who upon conviction for such felonious violation is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special drug offender. In no case shall the fact that the defendant is alleged to be a dangerous special drug offender be an issue upon the trial of such felonious violation, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special drug offender and his counsel.

[(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felonious violation, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felonious violation and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special drug offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felonious violation. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felonious violation. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

[(c) This section shall not prevent the imposition and execution of a sentence of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

[(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special drug offender to less than any mandatory minimum penalty prescribed by law for such felonious violation. This section shall not be construed as creating any mandatory minimum penalty.

[(e) A defendant is a special drug offender for purposes of this section if—

[(1) the defendant has previously been convicted in courts of the United States or a State or any political subdivision thereof for two or more offenses involving dealing in controlled substances, committed on occasions different from one another and different from such felonious violation, and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felonious violation, and less than five years have elapsed between the commission of such felonious violation and either the defendant's release, or parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense involving dealing in controlled substances and punishable by death or imprisonment in excess of one year under applicable laws of the United States or a State or any political subdivision thereof; or

[(2) the defendant committed such felonious violation as part of a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

[(3) such felonious violation was, or the defendant committed such felonious violation in furtherance of, a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing, or give or receive a bribe or use force in connection with such dealing.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such dealing. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Code of 1954. For purposes of paragraph (2) of this subsection, special skill or expertise in such dealing includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of such dealing, the enlistment of accomplices in such dealing, the escape from detection or apprehension for such dealing, or the disposition of the fruits or proceeds of such dealing. For purposes of paragraphs (2) and (3) of this subsection, such dealing forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

⟦(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felonious violation is required for the protection of the public from further criminal conduct by the defendant.

⟦(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

⟦(h) With respect to the imposition, correction, or reduction of a sentence after proceedings under this section, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felonious violation and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of the abuse of the right of the United States to take such review.]

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PROHIBITED ACTS A—PENALTIES

SEC. 1010. (a) Any person who—

* * * * * * *

(b)(1) In the case of a violation under subsection (a) with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. [If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.]

(2) In the case of a violation under subsection (a) with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. [If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.]

[(c) A special parole term imposed under this section or section 1012 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 1012 is in addition to, and not in lieu of, any other parole provided for by law.]

* * * * * * *

SECOND OR SUBSEQUENT OFFENSES

SEC. 1012. (a) Any person convicted of any offense under this part is, if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that otherwise authorized, by twice the fine otherwise authorized, or by both. [If the conviction is for an offense punishable under section 1010(b), and if it is the offender's second or subsequent offense, the court shall impose, in addition to any term of imprisonment and fine, twice the special parole term otherwise authorized.]

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TITLE 23: HIGHWAYS

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CHAPTER 1—FEDERAL-AID HIGHWAYS

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Sec.
114. Construction.

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§ 114. Construction

(a) The construction of any highways or portions of highways located on a Federal-aid system shall be undertaken by the respective State highway departments or under their direct supervision. Except as provided in section 117 of this title, such construction shall be subject to the inspection and approval of the Secretary. The construction work and labor in each State shall be performed under the direct supervision of the State highway department and in accordance with the laws of that State and applicable Federal laws. Construction may be begun as soon as funds are available for expenditure pursuant to subsection (a) of section 118 of this title. On any project where actual construction is in progress and visible to highway users, the State highway department shall erect such informational sign or signs as prescribed by the Secretary, identifying the project and the respective amounts contributed therefor by the State and Federal Governments.

(b) Convict labor shall not be used in such construction unless it is labor performed by convicts who are on parole, *supervised release,* or probation.

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TITLE 26: INTERNAL REVENUE CODE

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CHAPTER 53—MACHINE GUNS, DESTRUCTIVE DEVICES, AND CERTAIN OTHER FIREARMS

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Subchapter D—Penalties and Forfeitures

Sec.
5871. Penalties.
5872. Forfeitures.

§ 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both**[**, and shall become eligible for parole as the Board of Parole shall determine**]**.

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508. Vacancies.
509. Functions of the Attorney General.

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§ 509. Functions of the Attorney General

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.; and

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc. **[**; and**]**

[(4) of the Board of Parole.**]**

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CHAPTER 39—SPECIAL PROSECUTOR

Sec.
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593. Duties of the division of the court.
594. Authority and duties of a special prosecutor.
595. Reporting and congressional oversight.
596. Removal of a special prosecutor; termination of office.
597. Relationship with Department of Justice.
598. Termination of effect of chapter.

§ 591. Applicability of provisions of this chapter

(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a **[**petty offense**]** *Class B or C misdemeanor or an infraction.*

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CHAPTER 58—UNITED STATES SENTENCING COMMISSION

Sec.
991. United States Sentencing Commission; establishment and purposes.
992. Terms of office; compensation.
993. Powers and duties of Chairman.
994. Duties of the Commission.
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§ 991. United States Sentencing Commission; establishment and purposes

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least two of the members shall be Federal judges in regular active service selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

§ 992. Terms of office; compensation

(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that—

(1) two members, including the chairman, serve terms of six years;

(2) three members serve terms of four years; and

(3) two members serve terms of two years.

(b) No voting member may serve more than two full terms. A voting member appointed to fill a vacancy that occurs before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

(c) The Chairman of the Commission shall hold a full-time position and shall be compensated during the term of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chairman, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 225(a)(1)(B)(ii) of the Sentencing Reform Act of 1983, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chairman, shall hold part-time positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning his appointment as a Federal judge.

§ 993. Powers and duties of Chairman

The Chairman shall—

(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

(b) direct—

(1) the preparation of requests for appropriations for the Commission; and

(2) the use of funds made available to the Commission.

§ 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further

the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3573, and 3582(c) of title 18;

(D) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(E) the temporary release provisions set forth in section 3622 of title 18, and the pre-release custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the probation revocation provisions set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18.

(b) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 per centum.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release,

or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.

(h) The Commission shall assure that the guidelines will specify a sentence to a term of imprisonment at or near the maximum term authorized by section 3581(b) of title 18, United States Code, for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

(i) The Commission shall assure that the guidelines will specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(o) The Commission, at or after the beginning of a regular session of Congress but not later than the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.

(p) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(q) The Commission, within three years of the date of enactment of the Sentencing Reform Act of 1983, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or

lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(r) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

Within one hundred and eighty days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

(s) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(t) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify by what amount the sentences of prisoners serving terms of imprisonment that are outside the applicable guideline ranges for the offense may be reduced.

(u) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(v) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(w) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

§ 995. Powers of the Commission

(a) The Commission, by vote of a majority of the members present and voting, shall have the power to—

(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332);

(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

(6) without regard to 31 U.S.C. 3324, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

(7) accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services, notwithstanding the provisions of 31 U.S.C. 1342, however, individuals providing such services shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims;

(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

(11) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

(12) establish a research and development program within the Commission for the purpose of—

(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

(14) publish data concerning the sentencing process;

(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy;

(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

(22) perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities.

(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a) (1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.

(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

§ 996. Director and staff

(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.

(b) The Staff Director shall, subject to the approval of the Commission, appoint such officers and employees as are necessary in the execution of the functions of the Commission. The officers and employees of the Commission shall be exempt from the provisions of part III of title 5, United States Code, except the following chapters: 81 (Compensation for Work Injuries), 83 (Retirement), 85 (Unemployment Compensation), 87 (Life Insurance), 89 (Health Insurance), and 91 (Conflicts of Interest).

§ 997. Annual report

The Commission shall report annually to the Judicial Conference of the United States, the Congress, and the President of the United States on the activities of the Commission.

§ 998. Definitions

As used in this chapter—

(a) "Commission" means the United States Sentencing Commission;

(b) "Commissioner" means a member of the United States Sentencing Commission;

(c) "guidelines" means the guidelines promulgated by the Commission pursuant to section 994(a) of this title; and

(d) "rules and regulations" means rules and regulations promulgated by the Commission pursuant to section 995 of this title.

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CHAPTER 175—CIVIL COMMITMENT AND REHABILITATION OF NARCOTIC ADDICTS

Sec.
2901. Definitions.

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§ 2901. Definitions

As used in this chapter—

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(e) "Felony" includes any offense in violation of a law of the United States classified as a felony under [section 1] *section 3581* of title 18 of the United States Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a felony by the law of the place where that offense was committed.

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(g) "Eligible individual" means any individual who is charged with an offense against the United States, but does not include—

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(3) an individual against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole, *supervised release,* or mandatory release, has not been fully served: *Provided,* That an individual on probation, parole, *supervised release,* or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

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RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

TABLE OF RULES

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1. Scope
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5. Record
6. New Trial
7. Appeal
8. Local Rules
9. *Definition*

* * * * * * *

Rule 8. Local Rules

Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsistent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

Rule 9. Definition

As used in these rules, "petty offense" means a Class B or C misdemeanor or an infraction.

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TITLE 29: LABOR

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CHAPTER 11—LABOR-MANAGEMENT REPORTING AND DISCLOSURE PROCEDURE

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Subchapter VI—Safeguards for Labor Organizations

* * * * * * *

Sec.
504. Prohibition against certain persons holding office; violations and penalties.

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§ 504. Prohibition against certain persons holding office; violations and penalties

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) [the Board of Parole of the United States Department of Justice] *if the offense is a Federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the United States Department of Justice, the district court of the United States for the district in which the offense was committed, pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a),* determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of this chapter. Prior to making any such determiniation the [Board] *Court* shall hold [an administrative] *a* hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The [Board's] *Court's* determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.

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CHAPTER 17—COMPREHENSIVE EMPLOYMENT AND TRAINING PROGRAMS

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Subchapter I—Comprehensive Manpower Services

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Sec.
927. Special limitations.

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§ 927. Special limitations

(a) No individual shall be selected as an enrollee unless there is reasonable expectation that the individual can participate successfully in group situations and activities, is not likely to engage in behavior that would prevent other enrollees from receiving the benefit of the program or be incompatible with the maintenance of sound discipline and satisfactory relationships between the center to which the individual might be assigned and surrounding communities, and unless the individual manifests a basic understanding of both the rules to which the individual will be subject and of the consequences of failure to observe those rules.

(b) An individual on probation [or parole], *parole, or supervised release* may be selected only if release from the supervision of the probation or parole officials is satisfactory to those officials and the Secretary and does not violate applicable laws or regulations. No individual shall be denied a position in the Job Corps solely on the basis of that individual's contact with the criminal justice system.

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CHAPTER 18—EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

Subchapter I—Protection of Employee Benefit Rights

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Subtitle B—Regulatory Provisions

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Sec.

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1111. Persons prohibited from holding certain positions.
  (a) Conviction or imprisonment.
  (b) Penalty.
  (c) Definitions.

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§ 1111. Persons prohibited from holding certain positions

CONVICTION OR IMPRISONMENT

(a) No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzelement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of Title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a–9(a)(1) of Title 15, a violation of any provision of this Act, a violation of section 186 of Title 29, a violation of chapter 63 of Title 18, a violation of sections 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of Title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or

(2) as a consultant to any employee benefit plan, during or for five years after such conviction or after the end of such imprisonment, whichever is the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) **[**the Board of Parole of the United States Department of Justice**]** *if the offense is a Federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the United States Department of Justice, the district court of the United States for the district in which the offense was committed, pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a),* determines that such person's service in any capacity referred to in paragraph (1) or (2) would not be contrary to the purposes of this subchapter. Prior to making any such determination the **[**Board**]** *Court* shall hold **[**an administrative**]** *a* hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The **[**Board's**]** *Court's* determination in any such proceeding shall be final. No person shall knowingly permit any other person to serve in any capacity referred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee, of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing,

and determination by such Board of Parole that such service would be inconsistent with the intention of this section.

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DEFINITIONS

(c) For the purposes of this section:

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(3) A period of parole *or supervised release* shall not be considered as part of a period of imprisonment.

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TITLE 42: THE PUBLIC HEALTH AND WELFARE

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CHAPTER 6A—PUBLIC HEALTH SERVICE

Subchapter I—Administration

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PART E—NARCOTIC ADDICTS AND OTHER DRUG ABUSERS

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§ 257. Care and treatment of narcotic addicts

SURGEON GENERAL AUTHORIZED TO PROVIDE PROGRAMS

(a) The Surgeon General is authorized to provide for the confinement, care, protection, treatment, and discipline of persons addicted to the use of habit-forming narcotic drugs who are civilly committed to treatment [or convicted of offenses against the United States and sentenced to treatment] under the Narcotic Addict Rehabilitation Act of 1966, [addicts who are committed to the custody of the Attorney General pursuant to the provisions of the Federal Youth Corrections Act,] addicts and other persons with drug abuse and drug dependence problems who voluntarily submit themselves for treatment, and addicts convicted of offenses against the United States and who are not sentenced to treatment under the Narcotic Addict Rehabilitation Act of 1966, including persons convicted by general courts-martial and consular courts. Such care and treatment shall be provided at hospitals of the Service especially equipped for the accommodation of such patients or elsewhere where authorized under other provisions of law, and shall be designed to rehabilitate such persons, to restore them to health, and, where necessary, to train them to be self-supporting and self-reliant; but nothing in this section or in this part shall be construed to limit the authority of the Surgeon General under other provisions of law to provide for the conditional release of patients and for aftercare under supervision. In carrying out this subsection, the Secretary shall establish in each hospital and other appropriate medical facility of the Service a treatment and rehabilitation program for drug addicts and other persons with drug abuse and drug dependence problems who are in the area served by such hospital or other facility; except that the requirement of this sentence shall not apply in the case of any such hospital or other facility with respect to which the Secretary determines that there is not sufficient need for such a program in such hospital or other facility.

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§ 259. Convict addicts or other persons with drug abuse or drug dependence problems

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GRATUITIES AND TRANSPORTATION FURNISHED UPON DISCHARGE OR RELEASE ON PAROLE

(d) Every person convicted of an offense against the United States, upon discharge, or upon release on parole, *or supervised release* from a hospital of the Service, shall be furnished with the gratuities and transportation authorized by law to be furnished to prisoners upon release from a penal, correctional, disciplinary, or reformatory institution.

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TITLE 49: TRANSPORTATION

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11506. Registration of motor carriers by a State.
11507. Prison-made property governed by State law.

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§ 11507. Prison-made property governed by State law

Goods, wares, and merchandise produced or mined in a penal institution or by a prisoner not on parole, *supervised release*, or probation and transported into and used, sold, or stored in a State or territory or possession of the United States, is subject to the laws of that State, territory, or possession. This section does not apply to commodities produced in a penal institution of the United States Government for its use.

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TITLE 50: WAR AND NATIONAL DEFENSE

APPENDIX

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Military Selective Service Act 451

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§ 460. Selective Service System

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(b) Administrative provisions

The President is authorized—

(1) * * *

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(7) to prescribe eligibility, rules, and regulations governing the [parole] *release* for service in the armed forces, or for any other special service established pursuant to this title [sections 451 to 471a of this Appendix], of any person convicted of a violation of any of the provisions of this title [said sections];

CHANGES IN EXISTING LAW MADE BY TITLE III OF S. 1762

UNITED STATES CODE

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

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CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

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[1] Analysis does not conform to section catchline.

* * * * * * *

[§ 1963. Criminal penalties

[(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

[(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.]

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including righis, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) If any of the property described in subsection (a)—

(1) cannot be located;

(2) has been transferred to, sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value by any act or omission of the defendant; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant dem-

onstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property for at least seven successive court days in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

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COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

PUBLIC LAW 91-513; 84 STAT. 1236

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Sec. 1007. Persons required to register.
Sec. 1008. Registration requirements.
Sec. 1009. Manufacture or distribution for purposes of unlawful importation.
Sec. 1010. Prohibited acts A—penalties.
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Sec. 1012. Second or subsequent offenses.
Sec. 1013. Attempt and conspiracy.
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Sec. 1015. Applicability of part E of title II.
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PART B—AMENDMENTS AND REPEALS, TRANSITIONAL AND EFFECTIVE DATE PROVISIONS

Sec. 1101. Repeals.
Sec. 1102. Conforming amendments.
Sec. 1103. Pending proceedings.
Sec. 1104. Provisional registration.
Sec. 1105. Effective dates and other transitional provisions.

TITLE IV—REPORT ON ADVISORY COUNCILS

Sec. 1200. Report on advisory councils.

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TITLE II—CONTROL AND ENFORCEMENT

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PART C—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

* * * * * * *

DENIAL REVOCATION, SUSPENSION OF REGISTRATION

SEC. 304. (a) A registration pursuant to section 303 to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant—

* * * * * * *

(f) In the event the Attorney General suspends or revokes a registration granted under section 303, all controlled substances owned or possessed by the registrant pursuant to such registration at the the time of suspension or the effective date of the revocation order, as the case may be, may, in the discretion of the Attorney General, be placed under seal. No disposition may be made of any controlled substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded except that a court, upon application therefor, may at any time order the sale of perishable controlled substances. Any such order shall require the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances (or proceeds of sale deposited in court) shall be forfeited to the United States; and the Attorney General shall dispose of such controlled substances in accordance with section 511(e). *All right, title, and interest in such controlled substances shall vest in the United States upon a revocation order becoming final.*

PART D—OFFENSES AND PENALTIES

PROHIBITED ACTS A—PENALTIES

SEC. 401. (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

* * * * * * *

CONTINUING CRIMINAL ENTERPRISE

SEC. 408. (a) [(1)] Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in [paragraph (2)] *section 413 of this title*; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in [paragraph (2)] *section 413 of this title.*

[(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

[(A) the profits obtained by him in such enterprise, and

[(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.]

* * * * * * *

[(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a)) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.]

* * * * * * *

CRIMINAL FORFEITURES

PROPERTY SUBJECT TO CRIMINAL FORFEITURE

SEC. 413. (a) Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of this title

(21 U.S.C. 848), the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this title or title III, that the person forfeit to the United States all property described in this subsection.

MEANING OF TERM "PROPERTY"

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

THIRD PARTY TRANSFERS

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (o) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forefeiture under this section.

(d) If any of the property described in subsection (a)—

(1) cannot be located;

(2) has been transferred to, sold to, or deposited with a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value by any act or omission of the defendant; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

REBUTTABLE PRESUMPTION

(e) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this title or title III is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this title or title III or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this title or title III.

PROTECTIVE ORDERS

(f)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

WARRANT OF SEIZURE

(g) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (f) may not be suffi-

cient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

EXECUTION

(h) Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

DISPOSITION OF PROPERTY

(i) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

AUTHORITY OF THE ATTORNEY GENERAL

(j) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 511(e) of this title (21 U.S.C. 881(e)), of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

APPLICABILITY OF CIVIL FORFEITURE PROVISIONS

(k) Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 511(d) of this title (21 U.S.C. 881(d)) shall apply to a criminal forfeiture under this section.

BAR ON INTERVENTION

(l) Except as provided in subsection (o), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

JURISDICTION TO ENTER ORDERS

(m) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

DEPOSITIONS

(n) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

THIRD PARTY INTERESTS

(o)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property for at least seven successive court days in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the va-

lidity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> *(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or*
>
> *(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;*

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

PART E—ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

PROCEDURES

SEC. 501. (a) The Attorney General may delegate any of his functions under this title to any officer or employee of the Department of Justice.

* * * * * * *

FORFEITURES

SEC. 511. (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

* * * * * * *

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) Any property subject to *civil or criminal* forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

* * * * * * *

(4) the Attorney General has probable cause to believe that the property **[**has been used or is intended to be used in violation of**]** *is subject to civil or criminal forfeiture under* this title.

* * * * * * *

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under *any of* the provisions of this title, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, *if practicable,* to an appropriate location for disposition in accordance with law.

(d) All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under *any of* the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Whenever property is *civilly or criminally* forfeited under this title the Attorney General may—

(1) retain the property for official use *or transfer the custody or ownership of any forfeited property to any Federal, State, or local agency pursuant to section 616 of the Tariff Act of 1930 (19 U.S.C. 1616);*

(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(3) require that the General Services Administration take custody of the property [and remove it for disposition] *and dispose of it* in accordance with law; or

(4) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

The proceeds from any sale under paragraph (2) and any moneys forfeited under this subchapter shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs. The Attorney General shall forward to the Treasurer of the United States for deposit in [the general fund of the United States Treasury] *accordance with subsection (j) of this section* any amounts of such moneys and proceeds remaining after payment of such expenses.

* * * * * * *

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this title, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

* * * * * * *

(h) All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) The filing of an indictment or information alleging a violation of this title or title III which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j)(1) There is established in the United States Treasury a special fund to be known as the Drug Assets Forfeiture Fund (hereinafter in this subsection referred to as the "fund") which shall be available to the Attorney General without fiscal year limitation in such amounts as may be specified in appropriation Acts for the following purposes of the Department of Justice:

(A) the payment, at the discretion of the Attorney General, of any expenses necessary to seize, detain, inventory, safeguard, maintain, advertise, or sell property under seizure, detention, or forfeited pursuant to this Act or the Controlled Substances

Import and Export Act (21 U.S.C. 951 et seq.), or of any other necessary expenses incident to the seizure, detention, or forfeiture of such property; such payments may include payments for contract services and payments to reimburse any Federal, State, or local agency for any expenditures made to perform the foregoing functions;

(B) the payment of awards for information or assistance leading to a civil or criminal forfeiture under this Act, or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), at the discretion of the Attorney General;

(C) the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any provision of this Act or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made; and

(D) disbursements authorized in connection with remission and mitigation procedures relating to property forfeited under this Act or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.).

(2) Any reward paid from the fund for information concerning a forfeiture shall be paid at the discretion of the Attorney General or his delegate, except that the authority to pay a reward of $10,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. Any reward for such information shall not exceed the lesser of $150,000 or one quarter of the amount realized by the United States from the property forfeited.

(3) There shall be deposited in the fund all amounts remaining after payment of expenses for forfeiture and sale under subsection (e) of this section.

(4) Amounts in the fund which are not currently needed for the purpose of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(5) The Attorney General shall transmit to the Congress, not later than four months after the end of each fiscal year a detailed report on the amounts deposited in the fund and a description of expenditures made under this subsection.

(6) The provisions of this subsection relating to deposits in the fund shall apply to all property in the custody of the Department of Justice on or after the effective date of the Comprehensive Forfeiture Act of 1983.

(7) For the purposes described in paragraph (1)(A), (B), and (C), there are authorized to be appropriated from the fund for fiscal year 1984 not more than $10,000,000, for fiscal year 1985 not more than $15,000,000, for fiscal year 1986 not more than $20,000,000, and for fiscal year 1987 not more than $20,000,000. For fiscal years 1984, 1985, 1986, and 1987, there are authorized to be appropriated such amounts as may be necessary for the purpose described in paragraph (1)(D). Amounts in the fund in excess of the amounts appropriated at the end of each fiscal year shall be deposited in the General Fund of the United States Treasury. At the end of the last fiscal year for which appropriations from the fund are authorized by this

Act, the fund shall cease to exist and any amount then remaining in the fund shall be deposited in the General Fund of the Treasury of the United States.

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TITLE III—IMPORTATION AND EXPORTATION; AMENDMENTS AND REPEALS OF REVENUE LAWS

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PART A—IMPORTATION AND EXPORTATION

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AUTHORITY OF SECRETARY OF TREASURY

SEC. 1016. Nothing in this Act shall derogate from the authority of the Secretary of the Treasury under the customs and related laws.

CRIMINAL FORFEITURES

SEC. 1017. Section 413 of title II, relating to criminal forfeitures, shall apply in every respect to a violation of this title punishable by imprisonment for more than one year.

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TITLE 19: CUSTOMS DUTIES

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CHAPTER 4—TARIFF ACT OF 1930

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PART V—ENFORCEMENT PROVISIONS

Sec.
1588. Transportation between American ports via foreign ports.
1589. Arrest authority of customs officers.
1600. Application of the customs laws to other seizures by customs officers.

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1602. Seizure; report to customs officers.

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1605. Seizure; custody; storage.
1606. Seizure; appraisement.
1607. [Seizure; value $10,000 or less.] *Seizure; value $100,000 or less, prohibited articles, transporting conveyances.*
1608. Seizure; claims; judicial condemnation.
1609. Seizure; summary of forfeiture and sale.
1610. Seizure; value more than $10,000.
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  (a) Requirement of bond by regulation.
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PART VI—MISCELLANEOUS PROVISIONS

[1644. Application of section 177 of Title 49.]
1644. Application of the Federal Aviation Act and section 1518(d) of title 33.

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§ 1589. Arrest authority of customs officers

Subject to the direction of the Secretary of the Treasury, an officer of the Customs Service as defined in section 401(i) of this Act, as amended, may—

(1) carry a firearm;

(2) execute and serve any order, warrant, subpena, summons, or other process issued under the authority of the United States;

(3) make an arrest without a warrant for any offense against the United States committed in the officer's presence or for a felony, cognizable under the laws of the United States committed outside the officer's presence if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a felony; and

(4) perform any other law enforcement duty that the Secretary of the Treasury may designate.

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§ 1600. Application of the customs laws to other seizures by customs officers

The procedures set forth in sections 602 through 619 of this Act (19 U.S.C. 1602 through 1619) shall apply to seizures of any property effected by customs officers under any law enforced or administered by the Customs Service unless such law specifies different procedures.

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§ 1602. Seizure; report to customs officer

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, *aircraft,* merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

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§ 1605. Seizure; custody; storage

All vessels, vehicles, *aircraft,* merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the appropriate customs officer for the district in which the seizure was made to await disposition according to law.

Pending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due regard to the expense involved, whether or not the place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property.

§ 1606. Seizure; appraisement

The appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any vessel, vehicle, *aircraft,* merchandise, or baggage seized under the customs laws.

[§ 1607. Seizure; value $10,000 or less

[If such value of such vessel, vehicle, merchandise, or baggage does not exceed $10,000, the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. For the purposes of this section and sections 1610 and 1612 of this title merchandise the importation of which is prohibited shall be held not to exceed $10,000 in value.]

§ 1607. Seizure; value $100,000 or less, prohibited articles, transporting conveyances

(a) If—

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $100,000;

(2) such seized merchandise consists of articles the importation of which is prohibited; or

(3) such seized vessel, vehicle, or aircraft was used to import, export, or otherwise transport or store any controlled substances;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three *successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.*

(b) As used in this section, the term "controlled substance" has the meaning given that term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

§ 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, *aircraft,* merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of *$5,000 or 10 per centum of the value of the claimed property, whichever is lower, but not less than,* $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

§ 1609. Seizure; summary of forfeiture and sale

If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, *aircraft,* merchandise, or baggage forefeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold, or otherwise dispose of the same according to law and shall deposit the proceeds of sale, [after deducting the actual expenses of seizure, publication, and sale in the Treasury of the United States.] *after deducting expenses enumerated in section 613 of this Act into the Customs Forfeiture Fund.*

§1610. Seizure; value more than $10,000

[If the value of any vessel, vehicle, merchandise, or baggage so seized is greater than $10,000,] *If any vessel, vehicle, aircraft, merchandise, or baggage is not subject to the procedure set forth in section 607,* the appropriate customs officer shall transmit a report of the case, with the names of available witnesses, to the United States attorney for the district in which the seizure was made for the institution of the proper proceedings for the condemnation of such property.

§1611. Seizure; sale unlawful

If the sale of any vessel, vehicle, *aircraft,* merchandise, or baggage forfeited under the customs laws in the district in which seizure thereof was made be prohibited by the laws of the State in which such district is located, or if a sale may be made more advantageously in any other district, the Secretary of the Treasury may order such vessel, vehicle, *aircraft,* merchandise, or baggage to be transferred for sale in any customs district in which the sale thereof may be permitted. Upon the request of the Secretary of the Treasury, any court may, in proceedings for the forfeiture of any vessel, vehicle, *aircraft*, merchandise, or baggage under the customs laws, provide in its decree of forfeiture that the vessel, vehicle, *aircraft*, merchandise, or baggage, so forfeited, shall be delivered to the Secretary of the Treasury for disposition in accordance with the provisions of this section. If the Secretary of the Treasury is satisfied that the proceeds of any sale will not be sufficient to pay the costs thereof, he may order a destruction by the customs officers: *Provided*, That any merchandise forfeited under the customs laws, the sale or use of which is prohibited under any law of the United States or of any State, may, in the discretion of the Secretary of the Treasury, be destroyed, or remanufactured into an article that is not prohibited, the resulting article to be disposed of to the profit of the United States only.

§ 1612. Seizure; summary sale

Whenever it appears to the appropriate customs officer that any vessel, vehicle, *aircraft*, merchandise, or baggage seized under the customs laws is liable to perish or to waste or to be greatly reduced in value by keeping, or that the expense of keeping the same is disproportionate to the value thereof, **[**and the value of such vessel, vehicle, merchandise, or baggage as determined under section 1606 of this title, does not exceed $10,000,**]** *and the article is subject to the provisions of section 607 of this Act*, and such vessel, vehicle, *aircraft*, merchandise, or baggage has not been delivered under bond, such officer shall, proceed forthwith to advertise and sell the same at auction under regulations to be prescribed by the Secretary of the Treasury. **[**If such value of such vessel, vehicle, merchandise, or baggage exceeds $10,000,**]** *If the article is not subject to the provisions of section 607 of this Act*, such officer shall forthwith transmit the appraiser's return and his report of the seizure to the United States attorney, who shall petition the court to order an immediate sale of such vessel, vehicle, *aircraft*, merchandise, or baggage, and if the ends of justice require it the court shall order such immediate sale, the proceeds thereof to be deposited with the court to await the final determination of the condemnation proceedings. Whether such sale be made by the customs officer or by order of the court, the proceeds thereof shall be held subject to claims of parties in interest to the same extent as the vessel, vehicle, *aircraft*, merchandise, or baggage so sold would have been subject to such claim.

§ 1613. Disposition of proceeds of forfeited property

(a) Except as provided in subsection (b) of this section, any person claiming any vessel, vehicle, *aircraft*, merchandise, or baggage, or any interest therein, which has been forfeited and sold under the provisions of this chapter, may at any time within three months after the date of sale apply to the Secretary of the Treasury if the forfeiture and sale was under the customs laws, or if the forfeiture and sale was under the navigation laws, for a remission of the forfeiture and restoration of the proceeds of such sale, or such part thereof as may be claimed by him. Upon the production of satisfacry proof that the applicant did not know of the seizure prior to declaration or condemnation of forfeiture, and was in such cir nstances as prevented him from knowing of the same, and that such forfeiture was incurred without any willful negligence or intention to defraud on the part of the applicant, the Secretary of the Treasury may order the proceeds of the sale, or any part thereof, restored to the applicant, after deducting the cost of seizure and of ale, the duties, if any, accruing on the merchandise or baggage, and any sum due on a lien for freight, charges, or contribution in general average that may have been filed. If no application for such remission or restoration is made within three months after such sale, or if the application be denied by the Secretary of the Treasury, the proceeds of sale shall be disposed of as follows:

(1) For the payment of all proper expenses of the proceedings of forfeiture and sale, including expenses of seizure, maintaining the custody of the property, advertising and sale, and if condemned by a decree of a district court and a bond for such costs was not given, the costs as taxed by the court;

(2) For the satisfaction of liens for freight, charges, and contributions in general average, notice of which has been filed with the appropriate customs officer according to law; and

[(3) The residue shall be deposited with the Treasurer of the United States as a customs or navigational fine.]

(3) The residue shall be deposited in the Customs Forfeiture Fund.

§ 1613a. Customs Forfeiture Fund

(a) There is hereby established in the Treasury of the United States a special fund for the United States Customs Service that shall be entitled the "Customs Forfeiture Fund" (hereinafter referred to in this section as the "fund"). This fund shall be available without fiscal year limitation in such amounts as may be specified in appropriations Acts for the following purposes of the United States Customs Service—

(1) the payment of all proper expenses of the seizure or detention or the proceedings of forfeiture and sale (not otherwise recovered under section 613(a)) including but not limited to, expenses of inventory, security, maintaining the custody of the property, advertising and sale, and if condemned by the court and a bond for such costs was not given, the costs as taxed by the court; and

(2) the payment of awards of compensation to informers under section 619 of the Tariff Act of 1930, as amended.

(b) There shall be deposited in the fund all proceeds from the sale or other disposition of property forfeited under, and any currency or monetary instruments seized and forfeited under, the laws enforced or administered by the United States Customs Service.

(c) Amounts in the fund which are not currently needed for the purposes of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(d) The Commissioner of the Customs shall transmit to the Congress, not later than four months after the end of each fiscal year a detailed report on the amounts deposited in the fund and a description of expenditures made under this section.

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(e) The provisions of this section relating to deposits in the fund shall apply to all property in the custody of the United States Customs Service on or after the effective date of the Comprehensive Forfeiture Act of 1983.

(f) For the purposes described in subsection (a), there are authorized to be appropriated from the fund for fiscal year 1984 not more than $10,000,000, for fiscal year 1985 not more than $15,000,000, for fiscal year 1986 not more than $20,000,000, and for fiscal year 1987 not more than $20,000,000. Amounts in the fund in excess of the amounts appropriated at the end of each fiscal year shall be deposited in the General Fund of the Treasury of the United States. At the end of the last fiscal year for which appropriations from the fund are authorized by this Act, the fund shall cease to exist and any amount then remaining in the fund shall be deposited in the General Fund of the Treasury of the United States.

§ 1614. Release of seized property

If any person claiming an interest in any vessel, vehicle, *aircraft,* merchandise, or baggage seized under the provisions of this chapter offers to pay the value of such vessel, vehicle, *aircraft,* merchandise, or baggage, as determined under section 1606 of this title, and it appears that such person has in fact a substantial interest therein, the appropriate customs officer may, subject to the approval of the Secretary of the Treasury if under the customs laws, or under the navigation laws, accept such offer and release the vessel, vehicle, *aircraft,* merchandise, or baggage seized upon the payment of such value thereof, which shall be distributed in the order provided in section 1613 of this title.

§ 1615. Burden of proof in forfeiture proceedings

In all suits or actions (other than those arising under section 1592 of this title) brought for the forfeiture of any vessel, vehicle, *aircraft,* merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, *aircraft,* merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided,* That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying mechandise[1] or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communica-

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[1] So in original. Probably should read "merchandise".

tion therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

§ 1616. Disposition of forfeited property

(a) Notwithstanding any other provision of the law, the Commissioner is authorized to retain forfeited property, or to transfer such property on such terms and conditions as he may determine to—

(1) any other Federal agency; or

(2) any State or local law enforcement agency which participated directly in any of the acts which led to the seizure or forfeiture of the property.

The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency.

(b) The Secretary of the Treasury may order the discontinuance of any forfeiture proceedings under this Act in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this Act, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law.

(c) Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials.

(d) Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials.

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§ 1618. Remission or mitigation of penalties

Whenever any person interested in any vessel, vehicle, *aircraft,* merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, *aircraft,* merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: *Provided,* That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

§ 1619. Award of compensation to informers

Any person not an officer of the United States who detects and seizes any vessel, vehicle, *aircraft,* merchandise, or baggage subject to seizure and forfeiture under the customs laws or the navigation laws, and who reports the same to an officer of the customs, or who furnishes to a United States attorney, to the Secretary of the Treasury, or to any customs officer original information concerning any fraud upon the customs revenue, or a violation of the customs laws or the navigation laws, perpetrated or contemplated, which detection and seizure or information leads to a recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred, may be awarded and paid by the Secretary of the Treasury a compensation of 25 per centum of the net amount recovered, but not to exceed **[**$50,000**]** *$150,000* in any case, which shall be paid out of any appropriations available for the collection of the revenue from customs. For the purposes of this section an amount recovered under a bail bond shall be deemed a recovery of a fine incurred. If any vessel, vehicle, *aircraft,* merchandise, or baggage is forfeited to the United States, and is thereafter, in lieu of sale, destroyed under the customs or navigation laws or delivered to any governmental agency for official use, compensation of 25 per centum of the appraised value thereof may be awarded and paid by the Secretary of the Treasury under the provisions of this section, but not to exceed **[**$50,000**]** *$150,000* in any case. *In no event shall the Secretary delegate the authority to pay an award under this section in excess of $10,000 to an official below the level of the Commissioner of Customs.*

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[§ 1644. Application of section 177 of Title 49

[The authority vested by section 177 of Title 49 in the Secretary of the Treasury, and in the Commissioner of Customs, by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of customs, and of the laws and regulations relating to the entry and clearance of vessels, respectively, shall extend to the application in like manner of any of the provisions of this chapter or of any regulations promulgated hereunder.]

§ 1644. Application of the Federal Aviation Act and section 1518(d) of title 33

(a) The authority vested by section 1109 of the Federal Aviation Act of 1958 (49 U.S.C. 1509) in the Secretary of the Treasury, by regulation to provide for the application to civil air navigation of the laws and regulations relating to the administration of customs, and of the laws and regulations relating to the entry and clearance of

vessels, shall extend to the application in like manner of any of the provisions of this Act, or of the Anti-Smuggling Act of 1935, or of any regulations promulgated hereunder.

(b) For purposes of section 1518(d) of Title 33, the term "customs laws administered by the Secretary of the Treasury" shall mean this chapter and any other provisions of law classified to this title.

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TITLE 26: INTERNAL REVENUE CODE

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Subtitle F—Procedure and Administration

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Subchapter A—Examination and Inspection

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CHAPTER 78.—DISCOVERY OF LIABILITY AND ENFORCEMENT OF TITLE

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Sec.
7601. Canvass of districts for taxable persons and objects.
7602. Examination of books and witnesses.
7603. Service of summons.
7604. Enforcement of summons.
7605. Time and place of examination.
7606. Entry of premises for examination of taxable objects.
[7607. Additional authority for Bureau of Narcotics and Bureau of Customs.]
7608. Authority of internal revenue enforcement officers.
7609. Cross references.

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[§ 7607. Additional authority for Bureau of Narcotics and Bureau of Customs

[The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(1)), may—

[(1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpenas and summonses issued under the authority of the United States, and

[(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.]

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CHANGES IN EXISTING LAW MADE BY TITLE IV OF S. 1762

UNITED STATES CODE

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

CHAPTER 1—GENERAL PROVISIONS

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1. Offenses classified.
2. Principals.
3. Accessory after the fact.
4. Misprision of felony.
5. United States defined.
6. Department and agency defined.
7. Special maritime and territorial jurisdiction of the United States defined.
8. Obligation or other security of the United States defined.
9. Vessel of the United States defined.
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12. United States Postal Service defined.
13. Laws of States adopted for areas within Federal jurisdiction.
14. Applicability to Canal Zone; definition.
15. Obligation or other security of foreign government defined.

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20. Insanity defense

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§ 20. Insanity defense

(a) Affirmative Defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of Proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

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PART II—CRIMINAL PROCEDURE

CHAPTER 201—GENERAL PROVISIONS

Sec.
3001. Procedure governed by rules; scope, purpose and effect; definition of terms; local rules; forms—Rule.
3002. Courts always open—Rule.
3003. Calendars—Rule.

3004. Decorum in courtroom—Rule.
3005. Counsel and witnesses in capital cases.
3006. Assignment of counsel—Rule.
3006A. Adequate representation of defendants.

* * * * * * *

§ 3006A. Adequate representation of defendants

(a) CHOICE OF PLAN.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), [or, (4)] *(4) whose mental condition is the subject of a hearing pursuant to chapter 313 of this title, or (5)* for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

* * * * * * *

(g) DISCRETIONARY APPOINTMENTS.—Any person subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 [or section 4245 of title 18] may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (d) and (e).

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PART III—PRISONS AND PRISONERS

Chapter		Sec.
301.	General provisions	4001
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[CHAPTER 313—MENTAL DEFECTIVES

[Sec.

[4241. Examination and transfer to hospital.
[4242. Retransfer upon recovery.
[4243. Delivery to state authorities.[1]
[4244. Mental incompetency after arrest and before trial.
[4245. Mental incompetency undisclosed at trial.
[4246. Procedure upon finding of mental incompetency.
[4247. Alternate procedure on expiration of sentence.
[4248. Termination of custody by release or transfer.]

[1] So in original. Does not conform to section catchline.

[§ 4241. Examination and transfer to hospital

[A board of examiners for each Federal penal and correctional institution shall consist of (1) a medical officer appointed by the warden or superintendent of the institution; (2) a medical officer appointed by the Attorney General; and (3) a competent expert in mental diseases appointed by the Surgeon General of the United States Public Health Service.

[Such board shall examine any inmate of the institution alleged to be insane or of unsound mind or otherwise defective and report their findings and the facts on which they are based to the Attorney General.

[The Attorney General, upon receiving such report, may direct the warden or superintendent or other official having custody of the prisoner to cause such prisoner to be removed to the United States hospital for defective delinquents or to any other institution authorized by law to receive insane persons charged with or convicted of offenses against the United States, there to be kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served.]

[§ 4242. Retransfer upon recovery

[An inmate of the United States hospital for defective delinquents whose sanity or health is restored prior to the expiration of his sentence may be retransferred to any penal or correctional institution designated by the Attorney General, there to remain pursuant to the original sentence, computing the time of his detention or confinement in said hospital as part of the term of his imprisonment.]

[§ 4243. Delivery to state authorities on expiration of sentence

[The superintendent of the United States hospital for defective delinquents shall notify the proper authorities of the State, Territory, District, or Possession where any insane prisoner has his legal residence, or, if this cannot be ascertained, the proper authorities of the State, Territory, District, or Possession from which he was committed, of the date of expiration of sentence of any prisoner who, in the judgment of such superintendent, is still insane or a menace to the public. Such superintendent shall cause such prisoner to be delivered into the custody of the proper authorities of such State, Territory, District or Possession.]

[§ 4244. Mental incompetency after arrest and before trial

[Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.]

[§ 4245. Mental incompetency undisclosed at trial

[Whenever the Director of the Bureau of Prisons shall certify that a person convicted of an offense against the United States has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that there is probable cause to believe that such person was mentally incompetent at the time of his trial, provided the issue of mental competency was not raised and determined before or during said trial, the Attorney General shall transmit the report of the board of examiners and the certificate of the Director of the Bureau of Prisons to the clerk of the district court wherein the conviction was had. Whereupon the court shall hold a hearing to determine the mental competency of the accused in accordance with the provisions of section 4244 above, and with all the powers therein granted. In such hearing the certificate of the Director of the Bureau of Prisons shall be prima facie evidence of the facts and conclusions certified therein. If the court shall find that the accused was mentally incompetent at the time of his trial, the court shall vacate the judgment of conviction and grant a new trial.]

[§ 4246. Procedure upon finding of mental incompetency

[Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commitment shall be governed by section 4248 as herein provided.]

[§ 4247. Alternate procedure on expiration of sentence

[Whenever the Director of the Bureau of Prisons shall certify that a prisoner whose sentence is about to expire has been examined by the board of examiners referred to in title 18, United States Code, section 4241, and that in the judgment of the Director and the board of examiners the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, and that suitable arrangements for the custody and care of the prisoner are not otherwise available, the Attorney General shall transmit the certificate to the clerk of the court for the district in which the prisoner is confined. Whereupon the court shall cause the prisoner to be examined by a qualified psychiatrist designated by the court and one selected by the prisoner, and shall, after notice, hold a hearing to determine whether the conditions specified above exist. At such hearing the designated psychiatrist or psychiatrists shall submit his or their reports, and the report of the board of examiners and other institutional records relating to the prisoner's mental condition shall be admissible in evidence. All of the psychiatrists and members of the board who have examined the prisoner may be called as witnesses, and be available for further questioning by the court and cross-examination by the prisoner or on behalf of the Government. At such hearing the court may in its discretion call any other witnesses for the prisoner. If upon such hearing the court shall determine that the conditions specified above exist, the court may commit the prisoner to the custody of the Attorney General, or his authorized representative.]

[§ 4248. Termination of custody by release or transfer

[Whenever a person shall be committed pursuant to section 4247 of this title, his commitment shall run until the sanity or mental competency of the person shall be restored or until the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, the property, or other interests of the United States, or until suitable arrangements have been made for the custody and care of the prisoner by the State of his residence, whichever event shall first occur. Whereupon the Attorney General or his authorized representative shall file with the court which made said commitment a certificate stating the termination of the commitment and the ground therefor: *Provided, however,* That nothing herein contained shall preclude a prisoner committed under the authority of section 4247 hereof from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus. The Attorney General or his authorized representative shall have authority at any time to transfer a prisoner committed to his custody under the authority of section 4246 or section 4247 hereof to the proper authorities of the State of his residence.]

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CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

Sec.
4241. Determination of mental competency to stand trial.
4242. Determination of the existence of insanity at the time of the offense.
4243. Hospitalization of a person found not guilty only by reason of insanity.
4244. Hospitalization of a convicted person suffering from mental disease or defect.
4245. Hospitalization of an imprisoned person suffering from mental disease or defect.
4246. Hospitalization of a person due for release but suffering from mental disease or defect.
4247. General provisions for chapter.

§ 4241. Determination of mental competency to stand trial

(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of Finding of Competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

§ 4242. Determination of the existence of insanity at the time of the offense

(a) Motion for Pretrial Psychiatric or Psychological Examination.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(b) Special Verdict.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure or motion of the defendant or of the attorney for the government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of insanity.

§ 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) HEARING.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) BURDEN OF PROOF.—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) DETERMINATION AND DISPOSITION.—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(f) DISCHARGE.—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (e) determines that the person has recovered from his mental disease or defect to such an extent that his release, or his conditional release under a

prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the standard specified in subsection (d) that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(g) Revocation of Conditional Discharge.—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (f) shall notify the Attorney General and the court having jurisidiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

§ 4244. Hospitalization of a convicted person suffering from mental disease or defect

(a) Motion To Determine Present Mental Condition of Convicted Defendant.—A defendant found guilty of an offense, or the attorney for the government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(b) Psychiatric or Psychological Examination and Report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and Disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

(e) Discharge.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

§ 4245. Hospitalization of an imprisoned person suffering from mental disease or defect

(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF IMPRISONED DEFENDANT.—If a defendant serving a sentence of imprisonment objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the government, at the request of the director of the facility in which the defendant is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court shall grant the motion if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant may be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of his sentence of imprisonment, whichever occurs earlier.

(e) DISCHARGE.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned until the expiration of his sentence of imprisonment.

§ 4246. Hospitalization of a person due for release but suffering from mental disease or defect

(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a

mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) DISCHARGE.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the

person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of Conditional Discharge.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) Release to State of Certain Other Persons.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such respon-

sibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

§ 4247. General provisions for chapter—

(a) Definitions.—As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

(D) organized physical sports and recreation programs; and

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

(b) Psychiatric or Psychological Examination.—A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or clinical psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or Psychological Reports.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the government, and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) HEARING.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.—(1) The director of the facility in which a person is hospitalized pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) sections 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

(2) The director of the facility in which a person is hospitalized pursuant to sections 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) VIDEOTAPE RECORD.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) ADMISSIBILITY OF A DEFENDANT'S STATEMENT AT TRIAL.—A statement made by the defendant during the course of a psychiatric or psychological examination pursuant to section 4241 or 4242 is not admissible as evidence against the accused on the issue of guilt or punishment in any criminal proceeding, unless the defendant

waived his privilege against self incrimination, but is admissible on the issue of insanity.

(h) H*ABEAS* C*ORPUS* U*NIMPAIRED.—Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.*

(i) D*ISCHARGE.—Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of sections 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the government.*

(j) A*UTHORITY AND* R*ESPONSIBILITY OF THE* A*TTORNEY* G*ENERAL.—The Attorney General—*

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of sections 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(k) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

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FEDERAL RULES OF CRIMINAL PROCEDURE

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IV. Arraignment and Preparation for Trial:

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12.2 Notice of Defense Based Upon Mental Condition:
  (a) Defense of Insanity.
  (b) Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged.
  (c) Psychiatric Examination.
  (d) Failure to Comply.

Rule 12.2. Notice of Defense Based upon Mental Condition

(a) Defense of Insanity.—If a defendant intends to rely upon the defense of insanity at the time of the alleged [crime] *offense,* he shall, within the time provided for the filing of pretrail motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Mental Disease or Defect Inconsistent With the Mental Element Required for the Offense Charged.—If a defendant intends to introduce expert testimony relating to a mental disease, defect, or [other condition bearing upon the issue of whether he had the mental state required for the offense charged] *any other mental condition bearing upon the issue of guilt,* he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Psychiatric Examination.—In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit [to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court] *to an examination pursuant to 18 U.S.C. 4242.* No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

(d) Failure to Comply.—If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his [mental state] *guilt.*

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FEDERAL RULES OF EVIDENCE

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ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

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[Rule 704. Opinion on Ultimate Issue

[Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.]

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

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CHANGES IN EXISTING LAW MADE BY TITLE V OF S. 1762

COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

PUBLIC LAW 91-513; 84 STAT. 1236

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Sec. 101. Findings and declarations.
Sec. 102. Definitions.
Sec. 103. Increased numbers of enforcement personnel.

PART B—AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

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Sec. 515. Burden of proof; liabilities.
Sec. 516. Payments and advances.

Part F—Advisory Commission

Sec. 601. Establishment of Commission on Marihuana and Drug Abuse.

Part G—Conforming, Transitional, and Effective Date, and General Provisions

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Sec. 702. Pending proceedings.
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Sec. 1105. Effective dates and other transitional provisions.

TITLE IV—REPORT ON ADVISORY COUNCILS

Sec. 1200. Report on advisory councils.

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TITLE II—CONTROL AND ENFORCEMENT

PART A—SHORT TITLE; FINDINGS AND DECLARATION; DEFINITIONS

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DEFINITIONS

SEC. 102. As used in this title:

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(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

(14) The term "isomer" means the optical isomer, except as used in section 202(c) schedule I(b) and section 202(c) schedule II(a)(5). As used in section 202(c) schedule I(b), the term "isomer" means the optical, positional or geometric isomer. As used in section 202(c) schedule II(a)(5), the term "isomer" means the optical or geometric isomer.

[(14)**]** *(15)* The term "manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice. The term "manufacturer" means a person who manufactures a drug or other substance.

[(15)**]** *(16)* The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

[(16) The term "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

[(A) Opium, coca leaves, and opiates.

[(B) A compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates.

[(C) A substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clause (A) or (B).
Such term does not include decocainized coca leaves or extracts of coca leaves, which extracts do not contain cocaine or ecgonine.]

(17) The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

(B) Poppy straw and concentrate of poppy straw.

(C) Coca leaves. Such term does not include coca leaves and extracts of coca leaves from which cocaine, ecgonine and derivatives of ecgonine their salts have been removed.

(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.

(E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

(F) Any compound, mixture or preparation which contains any quantity of any of the substances referred to in clauses (A) through (E).

[17] *(18)* The term "opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability.

[18] *(19)* The term "opium poppy" means the plant of the species Papaver somniferum L., except the seed thereof.

[19] *(20)* The term "poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

[20] *(21)* The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

[21] *(22)* The term "production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

[22] *(23)* The term "immediate precursor" means a substance—

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[23] *(24)* The term "Secretary", unless the context otherwise indicates, means the Secretary of Health and Human Services.

[24] *(25)* The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Common-

wealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the Canal Zone.

[25] *(26)* The term "ultimate user" means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.

[26] *(27)* The term "United States", when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States.

[27] *(28)* The term "maintenance treatment" means the dispensing, for a period in excess of twenty-one days, of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs.

[28] *(29)* The term "detoxification treatment" means the dispensing, for a period not in excess of twenty-one days, of a narcotic drug in decreasing doses to an individual in order to alleviate adverse physiological or psychological effects incident to withdrawal from the continuous or sustained use of a narcotic drug and as a method of bringing the individual to a narcotic drug-free state within such period.

[29] *(30)* The term "Convention on Psychotropic Substances" means the convention on Psychotropic Substances signed at Vienna, Austria, on February 21, 1971; and the term "Single Convention on Narcotic Drugs" means the single Convention on Narcotic Drugs signed at New York, New York, on March 30, 1961.

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PART B—AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

AUTHORITY AND CRITERIA FOR CLASSIFICATION OF SUBSTANCES

SEC. 201. (a) The Attorney General shall apply the provisions of this title to the controlled substances listed in the schedules established by section 202 of this title and to any other drug or other substance added to such schedules under this title. Except as provided in subsections (d) and (e), the Attorney General may by rule—

* * * * * * *

NON-NARCOTIC SUBSTANCES SOLD OVER COUNTER WITHOUT PRESCRIPTION; DEXTROMETHORPHAN

[(g)(1) The Attorney General shall by regulation exclude any non-narcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.]

(g)(1) The Attorney General may, by regulation, exempt any compound, mixture, or preparation containing a controlled substance from the application of all or any part of this title if he finds such compound, mixture, or preparation meets the requirements of one of the following categories:

(A) EXEMPT OVER THE COUNTER PREPARATIONS.—A compound, mixture or preparation containing a nonnarcotic controlled sub-

stance which may, under the Federal Food, Drug and Cosmetic Act, be lawfully sold over the counter without a prescription.

(B) Exempt prescription preparations.*—A compound, mixture or preparation containing a non-narcotic controlled substance and which is approved for prescription use and which contains one or more other active ingredients which are not listed in any schedule. In addition, such other ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse.*

(C) Exempt chemical preparations.*—A compound, mixture or preparation which contains any controlled substance and which is not for administration to a human being or animal, and is packaged in such form or concentration, or with adulterants or denaturants, so that the packaged quantities do not present any significant potential for abuse.*

* * * * * * *

(h) If the Attorney General finds that such action is necessary to avoid an imminent hazard to the public safety, he may, by temporary rule without prior notice or hearing, and without regard to the requirements of subsection (b) relating to the Secretary of Health and Human Services, control any drug or other substance. A finding that the issuance of a temporary rule under this subsection is necessary to avoid an imminent hazard to the public safety shall be good cause for and, unless otherwise provided by the Attorney General, shall constitute a finding for the purpose of section 553(b) of title 5, United States Code, that notice and public procedure on making such a temporary rule are impractical, unnecessary, and contrary to the public interest.

(1) When issuing a temporary rule under this subsection, the Attorney General shall be required to consider, with respect to this finding of an imminent hazard to the public safety, only those factors set forth in section 201(c) (4), (5) and (6), including, but not limited to, actual abuse, diversion from legitimate channels, and clandestine importation, manufacture or marketing.

(2) The Attorney General shall transmit notice of the temporary scheduling of any drug or substance to the Secretary of Health and Human Services who, within thirty days from the date of such notice, may object to the temporary placement. Unless the Secretary has currently available evidence relating to the lack of abuse potential of the drug or substance, his consideration shall be limited to the factors set forth in subsection (1) of this section. The Secretary's objection to temporary control shall be binding upon the Attorney General but shall be considered as affecting the temporary scheduling only and shall in no way reflect upon any subsequent proceedings under section 201(a) to permanently control or reschedule the same drug or substance.

(3) The temporary scheduling of any drug or substance shall expire at the end of one year from the date of the temporary scheduling thereof, except that the Attorney General may, during the pendency of proceedings under section 201(a)(1), extend the temporary placement for periods of six months.

(4) A temporary rule issued under this subsection shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiat-

ed under section 201(a) and no such temporary rule may be issued subsequent to the initiation of formal rulemaking proceedings as to the same drug or substance.

(5) Notwithstanding the schedule in which a drug is placed pursuant to this subsection, the penalty for the illegal manufacture, distribution, dispensing or possession with intent to manufacture, distribute or dispense, shall be that provided by section 401(b)(1)(c) for schedule III controlled substances.

(6) With respect to the requirements of title II, part C, only the requirements of section 302 (registration) and section 307 (recordkeeping and reporting) shall apply to a drug for as long as it is temporarily scheduled.

(7) The issuance of a temporary rule under this subsection shall not constitute a final determination for purposes of review under section 507 of this title, nor shall such temporary rule be otherwise reviewable.

SCHEDULES OF CONTROLLED SUBSTANCES

SEC. 202. (a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this title and shall be updated and republished on an annual basis thereafter.

* * * * * * *

[(d) The Attorney General may by regulation except any compound, mixture, or preparation containing any depressant or stimulant substance in paragraph (a) or (b) of schedule III or in schedule IV or V from the application of all or any part of this subchapter if (1) the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system, (2) such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system, and (3) such exception does not conflict with United States obligations under the Convention on Psychotropic Substances.]

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PART C—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

* * * * * * *

PERSONS REQUIRED TO REGISTER

SEC. 302. [(a) Every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance, shall obtain annually a registration issued by the Attorney

General in accordance with the rules and regulations promulgated by him.]

(a)(1) Every person who manufactures or distributes any controlled substance, or who proposes to engage in the manufacture or distribution of any controlled substance, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.

(2) Every person who dispenses, or who proposes to dispense, any controlled substance, shall obtain from the Attorney General a registration issued in accordance wih the rules and regulations promulgated by him. The Attorney General shall, by regulation, determine the period of such registrations. In no event, however, shall such registrations be issued for less than one year nor for more than three years.

* * * * * * *

REGISTRATION REQUIREMENTS

SEC. 303. (a) The Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part. In determining the public interest, the following factors shall be considered:

* * * * * * *

[(f) Practitioners shall be registered to dispense or conduct research with controlled substances in schedule II, III, IV, or V if they are authorized to dispense or conduct research under the law of the State in which they practice. Separate registration under this part for practitioners engaging in research with nonnarcotic controlled substances in scheduled II, III, IV, or V, who are already registered under this part in another capacity, shall not be required. Pharmacies (as distinguished from pharmacists) when engaged in commercial activities, shall be registered to dispense controlled substances in schedule II, III, IV, or V if they are authorized to dispense under the law of the State in which they regularly conduct business. Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be denied by the Attorney General only on a ground specified in section 304(a).]

(f) The Attorney General shall register practitioners (including pharmacies, as distinguished from—pharmacists) to dispense, or conduct research with, controlled substances in schedules II, III, IV, or V, if the applicant is authorized to dispense, or conduct research

with respect to, controlled substances under the laws of the State in which he practices; provided, however, that the Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) the recommendation of the appropriate State licensing board or professional disciplinary authority;

(2) the applicant's past experience in dispensing, or conducting research with respect to controlled substances;

(3) the applicant's prior conviction record under Federal, State or local laws relating to the manufacture, distribution, or dispensing of controlled substances;

(4) compliance with applicable State, Federal or local laws relating to controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

Separate registration under this part for practitioners engaging in research with controlled substances in schedules II, III, IV, or V, who are already registered under this part in another capacity, shall not be required. Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be denied by the Attorney General only on a ground specified in section 304(a).

DENIAL, REVOCATION, OR SUSPENSION OF REGISTRATION

SEC. 304. (a) A registration pursuant to section 303 to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant—

(1) has materially falsified any application filed pursuant to or required by this title or title III;

(2) has been convicted of a felony under this title or title III or any other law of the United States, or of any State, relating to any substance defined in this title as a controlled substance; [or]

(3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances[.]*; or*

(4) has committed such acts as would render his registration under section 303 inconsistent with the public interest as defined therein.

* * * * * * *

(f) In the event the Attorney General suspends or revokes a registration granted under section 303, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may, in the discretion of the Attorney General, be placed under seal. No disposition may be made of any controlled substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded except that a court, upon application therefor, may at any time order the sale of perishable controlled substances. Any such order shall require the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances (or proceeds of sale deposited in court) shall be forfeited to the United States; and the Attorney General shall dispose of such controlled substances in accordance with section 511(e).

(2) The Attorney General may, in his discretion, place under seal any controlled substances owned or possessed by a registrant whose registration has expired, or who has ceased to practice or do business in the manner contemplated by his registration. Such controlled substances shall be held for the benefit of the registrant, or his successor in interest, for a period of ninety days, following which the Attorney General may dispose of such controlled substances in accordance with section 511(e).

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RECORDS AND REPORTS OF REGISTRANTS

SEC. 307. (a) Except as provided in subsection (c)—

* * * * * * *

(c) The foregoing provisions of this section shall not apply—

(1)⟦(A) with respect to any narcotic controlled substance in schedule II, III, IV, or V, to the prescribing or administering of such substance by a practitioner in the lawful course of his professional practice unless such substance was prescribed or administered in the course of maintenance treatment or detoxification treatment of an individual⟧ *(A) to the prescribing of controlled substances in schedules II, III, IV, or V by practitioners acting in the lawful course of their professional practice*; or

⟦(B) with respect to nonnarcotic controlled substances in schedule II, III, IV, or V, to any practitioner who dispenses such substances to his patients, unless the practitioner is regularly engaged in charging his patients, either separately or together with charges for other professional services, for substances so dispensed;⟧

(B) to the administering of a controlled substance in Schedules II, III, IV, or V unless the practitioner regularly engages in the dispensing or administering of controlled substances and charges his patients, either separately or together with charges for other professional services, for substances so administered.

* * * * * * *

(f) Regulations under sections 355(i) and 360b(j) of this title, relating to investigational use of drugs, shall include such procedures as the Secretary, after consultation with the Attorney General, determines are necessary to insure the security and accountability of controlled substances used in research to which such regulations apply.

(g) Every registrant under this title shall be required to report any change of professional or business address in such manner as the Attorney General shall by regulation require.

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PART D—OFFENSES AND PENALTIES

PROHIBITED ACTS A—PENALTIES

SEC. 401. (a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

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(b) Except as otherwise provided in section 405, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) *(A) In the case of a violation of subsection (a) of this section involving—*

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(a) coca leaves;

(b) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(c) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD); such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both.

If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both.

[(A)**]** *(B)* In the case of a controlled substance in schedule I or II **[**which is a narcotic drug**]** *except as provided in subparagraphs (A) and (C),* such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than **[**$25,000**]** *$125,000,* or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law **[**of the United States**]** *of a State, the United States, or a foreign country* relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than [$50,000] *$250,000,* or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

[(B)] *(C)* In the case of [a controlled substance in schedule I or II which is not a narcotic drug] *less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil* or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) [, (5), and (6)] *and (5)* of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than [$15,000] *$50,000,* or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law [of the United States] *of a State, the United States, or a foreign country* relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than [$30,000] *$100,000,* or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than [$10,000] *$25,000,* or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law [of the United States] *of a State, the United States, or a foreign country* relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than [$20,000] *$50,000,* or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of inprisonment of not more than one year, a fine of not more than [$5,000] *$10,000,* or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law [of the United States] *of a State,*

the United States, or a foreign country relating to narcotic drugs, marihuana, or depresant or stimulant substances, have become final, such person shall be a sentenced to a term of imprisonment of not more than 2 years, a fine of not more than **[**$10,000**]** *$20,000*, or both.

(4) Notwithstanding paragraph **[**(1)(B)**]** *(1)(C)* of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

[(5) Nothwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distribution, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

[(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.**]**

(5) Notwithstanding paragraph (1), any person who violates subsection (a) by cultivating a controlled substance on Federal property shall be fined not more than—

(A) $500,000 if such person is an individual; and
(B) $1,000,000 if such person is not an individual.

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PROHIBITED ACTS C—PENALTIES

SEC. 403. (a) It shall be unlawful for any person knowingly or intentionally—

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 308 of this title;

[(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;]

(2) to use in the course of the manufacture, distribution, or dispensing of a controlled substance, or to use for the purpose of acquiring or obtaining a controlled substance, a registration number which is fictitious, revoked, suspended, expired, or issued to another person.

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PART E—ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

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COOPERATIVE ARRANGEMENTS

SEC. 503. (a) The Attorney General shall cooperate with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he is authorized to—

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(4) maintain in the Department of Justice a unit which will accept, catalog, file, and otherwise utilize all information and statistics, including records of controlled substance abusers and other controlled substance law offenders, which may be received from Federal, State, and local agencies, and make such information available for Federal, State, and local law enforcement purposes; [and]

(5) conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted[.] *; and*

(6) enter into grant-in-aid programs with state and local governments to assist them to suppress the diversion of controlled substances from legitimate medical, scientific, and commercial channels. Funds annually appropriated for this purpose shall remain available until expended.

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FOREFEITURES

SEC. 511. (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

[(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.]

(1) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of this title.

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TITLE III—IMPORTATION AND EXPORTATION; AMENDMENTS AND REPEALS OF REVENUE LAWS

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PART A—IMPORTATION AND EXPORTATION

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IMPORTATION OF CONTROLLED SUBSTANCES

SEC. 1002. (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, except that—

[(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and]

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, [or]

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 303, *or*

(C) is in limited quantities for ultimate scientific, analytical or research uses exclusively, may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance—

(1) is imported for medical, scientific, or other legitimate uses, and

[(2) is imported pursuant to such notification or declaration requirements as the Attorny General may by regulation prescribe, except that if a nonnarcotic controlled substance in schedule III, IV, or V is also listed in schedule I or II of the Convention on Psychotropic Substances it shall be imported pursuant to such import permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention.]

(2) is imported pursuant to such notification, or declaration, or in the case of any nonnarcotic controlled substance in Schedule III, such import permit, notification or declaration, as the Attorney General may by regulation prescribe.

EXPORTATION OF CONTROLLED SUBSTANCES

SEC. 1003. (a) It shall be unlawful to export from the United States any narcotic drug in schedule I, II, III, or IV unless—

* * * * * * *

[(e) It shall be unlawful to export from the United States to any other country any nonnarcotic controlled substance in schedule III or IV or any controlled substance in schedule V unless—

[(1) there is furnished (before export) to the Attorney General documentary proof that importation is not contrary to the laws or regulations of the country of destination;

[(2) a special controlled substance invoice, in triplicate, accompanies the shipment setting forth such information as the Attorney General may prescribe to identify the parties to the shipment and the means of shipping;

[(3) two additional copies of the invoice are forwarded to the Attorney General before the controlled substance is exported from the United States; and

[(4) in any case when a nonnarcotic controlled substance in schedule III, IV, or V is also listed in schedule I or II of the Convention on Psychotropic Substances, it is exported pursuant to such export permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention, instead of the invoice required by paragraphs (2) and (3) of this subsection.]

(e) It shall be unlawful to export from the United States to any other country any nonnarcotic controlled substance in schedule III or IV or any controlled substances in schedule V unless—

(1) there is furnished (before export) to the Attorney General documentary proof that importation is not contrary to the laws or regulations of the country of destination for consumption for medical, scientific or other legitimate purposes; and

(2) it is exported pursuant to such notification, or declaration, or in the case of any nonnarcotic controlled substance in schedule III, such import permit, notification or declaration, as the Attorney General may by regulation prescribe.

* * * * * * *

PERSONS REQUIRED TO REGISTER

SEC. 1007. (a) No person may—

(1) import into the customs territory of the United States from any place outside thereof (but within the United States),

or import into the United States from any place outside thereof, any controlled substance, or

[(2) export from the United States any controlled substance in schedule I, II, III, or IV.]

(2) export from the United States any controlled substance in schedule I, II, III, IV, or V unless there is in effect with respect to such person a registration issued by the Attorney General under section 1008, or unless such person is exempt from registration under subsection (b).

REGISTRATION REQUIREMENTS

SEC. 1008. [(a) The Attorney General shall register an applicant to import or export a controlled substance in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on the effective date of this section. In determining the public interest, the factors enumerated in paragraph (1) through (6) of section 303(a) shall be considered.]

(a) The Attorney General shall register an applicant to import or export a controlled substance in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on the effective date of this section. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against the diversion of any controlled substances both within the United States and international commerce;

(2) compliance with applicable State and local laws;

(3) prior conviction record of the applicant under Federal and State laws relating to controlled substances;

(4) past experience in the handling of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

[(b) Registration granted under subsection (a) of this section shall not entitle a registrant to import or export controlled substances in schedule I or II other than those specified in the registration.]

(b) Registration granted under this section shall not entitle a registrant to import or export controlled substances other than those specified in the registration.

[(c) The Attorney General shall register an applicant to import a controlled substance in schedule III, IV, or V or to export a controlled substance in schedule III or IV, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the factors enumerated in paragraphs (1) through (6) of section 303(d) shall be considered.]

(c) The Attorney General shall register an applicant to import or to export a controlled substance in schedules III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against the diversion of any controlled substances;

(2) compliance with applicable State and local laws;

(3) prior conviction record of the applicant under Federal and State laws relating to controlled substances;

(4) past experience in the handling of controlled substances;

(5) such other factors as may be relevant to and consistent with the public health and safety.

(d) Actions to deny an application for registration or to revoke or suspend a registration under this section.

(1) The Attorney General may deny an application for registration or revoke or suspend a registration under subsection (a) if he is unable to determine that such registration is consistent with the public interest (as defined in subsection (a)) and with the United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part.

(2) The Attorney General may deny an application for registration or revoke or suspend a registration under subsection (c), if he determines that such registration is inconsistent with the public interest (as defined in subsection (c)) or with United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part.

(3) The Attorney General may limit the revocation or suspension of a registration to the particular controlled substance, or substances, with respect to which grounds for revocation or suspension exist.

(4) Before taking action pursuant to this section, the Attorney General shall serve upon the applicant or registrant an order to show cause as to why the registration should not be denied, revoked or suspended. The order to show cause shall contain a statement of the basis thereof and shall call upon the applicant or registrant to appear before the Attorney General, or his designee, at a time and place stated in the order, but in no event less than thirty days after the date of receipt of the order. Proceedings to deny, revoke, or suspend shall be conducted pursuant to this section in accordance with subchapter II of chapter 5 of title 5 of the United States Code. Such proceeding shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this title or any other law of the United States.

(5) The Attorney General may, in his discretion, suspend any registration simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to the public health and safety. Such suspension shall continue in effect until the conclusion of such proceedings, including judicial review thereof, unless sooner withdrawn by the Attorney General or dissolved by a court of competent jurisdiction.

(6) The suspension or revocation of a registration under this section shall operate to suspend or revoke any quota applicable under section 306 of the Controlled Substances Act.

(7) In the event that the Attorney General suspends or revokes a registration granted under this section, all controlled substances owned or possessed by the registrant pursuant to such

registration at the time of suspension or the effective date of the revocation order, as the case may be, may, in the discretion of the Attorney General, be placed under seal. No disposition may be made of any controlled substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded, except that a court, upon application therefor, may at any time order the sale of perishable controlled substances. Any such order shall require the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances (or proceeds of the sale thereof which have been deposited with the court) shall be forfeited to the United States; and the Attorney General shall dispose of such controlled substances in accordance with section 511(e) of the Controlled Substances Act.

[(d)] *(e)* No registration shall be issued under this part for a period in excess of one year. Unless the regulations of the Attorney General otherwise provide, section 302(f), [304,] 305, and 307 shall apply to persons registered under this section to the same extent such sections apply to persons registered under section 303.

[(e)] *(f)* The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration of importers and exporters of controlled substances under this section.

[(f)] *(g)* Persons registered by the Attorney General under this section to import or export controlled substances may import or export (and, for the purpose of so importing or exporting, may possess) such substances to the extent authorized by their registration and in conformity with the other provisions of this title and title II.

[(g)] *(h)* A separate registration shall be required at each principal place of business where the applicant imports or exports controlled substances.

[(h) Except in emergency situations as described in section 1002(a) (2) (A), prior to issuing a registration under this section to a bulk manufacture of a controlled substance in schedule I or II, and prior to issuing a regulation under section 1002(a) authorizing the importation of such a substance, the Attorney General shall give manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.]

(i) prior to issuing a registration under section 1002(a)(2)(B), the Attorney General shall give manufacturers holding registrations for the bulk manufacture of such controlled substance an opportunity to comment upon the adequacy of existing competition among domestic manufacturers.

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Part A—Importation and Exportation

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PROHIBITED ACTS A—PENALTIES

SEC. 1010. (a) Any person who—

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(b) *(1) In the case of violation under subsection (a) of this section involving—*

(A) 100 grams or more of a mixture or substance containing a detectable amount of a narcotic drug in schedule I or II other than a narcotic drug consisting of—

(i) coca leaves;

(ii) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(iii) a substance chemically identical thereto;

(B) a kilogram or more of any other narcotic drug in schedule I or II;

(C) 500 grams or more of phencyclidine (PCP);

(D) 5 grams or more of lysergic acid diethylamide (LSD);

the person committing such violation shall be imprisoned for not more than twenty years, or fined not more than $250,000, or both.

[(1)] *(2)* In the case of a violation under subsection (a) of this section with respect to a [narcotic drug in schedule I or II, the person committing such violation shall] *controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1) and (3),* be imprisoned not more than fifteen years, or fined not more than [$25,000] *$125,000,* or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition of such term of imprisonment.

[(2)] *(3)* In the case of a violation under subsection (a) of this section with respect to [a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall] *less than 50 kilograms of marihuana, less than 10 kilograms of hashish, less than one kilogram of hashish oil, or any quantity of a controlled substance in schedule III, IV, or V, the person committing such violation shall, except as provided in paragraph (4)* be imprisoned not more than five years, or be fined not more than [$15,000] *$50,000,* or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

* * * * * * *

SECOND OR SUBSEQUENT OFFENSES

SEC. 1012. (a) Any person convicted of any offense under this part is, if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that otherwise authorized, by twice the fine otherwise authorized, or by both. If the conviction is for an offense punishable under section 1010(b), and if it is the offender's second or subsequent offense, the court shall impose, in addition to any term of imprisonment and fine, twice the special parole term otherwise authorized.

(b) For purposes of this section, a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of him for a felony under any provision of this title or title II or other law of [the

United States] *a State, the United States, or a foreign country* relating to narcotic drugs, marihuana, or depressant or stimulant drugs, have become final.

(c) Section 411 shall apply with respect to any proceeding to sentence a person under this section.

* * * * * * *

CHANGES IN EXISTING LAW MADE BY TITLE VI OF S. 1762

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

SEC. 2. Title I of the Omnibus Crime Control and Safe Streets Act of 1968 is amended to read as follows:

["TITLE I—JUSTICE SYSTEM IMPROVEMENT

["TABLE OF CONTENTS

["Declaration and purpose.

["PART A—LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

["Sec. 101. Establishment of Law Enforcement Assistance Administration.
["Sec. 102. Duties and functions of Administrator.
["Sec. 103. Office of Community Anti-Crime Programs.

["PART B—NATIONAL INSTITUTE OF JUSTICE

["Sec. 201. National Institute of Justice.
["Sec. 202. Establishment, duties, and functions.
["Sec. 203. Authority for 100 per centum grants.
["Sec. 204. National Institute of Justice Advisory Board.

["PART C—BUREAU OF JUSTICE STATISTICS

["Sec. 301. Bureau of Justice Statistics.
["Sec. 302. Establishment, duties, and functions.
["Sec. 303. Authority for 100 per centum grants.
["Sec. 304. Bureau of Justice Statistics Advisory Board.
["Sec. 305. Use of data.

["PART D—FORMULA GRANTS

["Sec. 401. Description of program.
["Sec. 402. Eligibility.
["Sec. 403. Applications.
["Sec. 404. Review of applications.
["Sec. 405. Allocation and distribution of funds.

["PART E—NATIONAL PRIORITY GRANTS

["Sec. 501. Purpose.
["Sec. 502. Percentage of appropriation for national priority grant program.
["Sec. 503. Procedure for designating national priority programs.
["Sec. 504. Application requirements.
["Sec. 505. Criteria for award.

["PART F—DISCRETIONARY GRANTS

["Sec. 601. Purpose.
["Sec. 602. Percentage of appropriation for discretionary grant program.
["Sec. 603. Procedure for establishing discretionary programs.
["Sec. 604. Application requirements.
["Sec. 605. Criteria for award.
["Sec. 606. Period for award.

["PART G—TRAINING AND MANPOWER DEVELOPMENT

["Sec. 701. Purpose.
["Sec. 702. Training of prosecuting attorneys.

["Sec. 703. Training State and local criminal justice personnel.
["Sec. 704. FBI training of State and local criminal justice personnel.
["Sec. 705. Criminal justice education program.

["PART H—ADMINISTRATIVE PROVISIONS

["Sec. 801. Establishment of Office of Justice Assistance, Research, and Statistics.
["Sec. 802. Consultation; establishment of rules and regulations.
["Sec. 803. Notice and hearing on denial or termination of grant.
["Sec. 804. Finality of determinations.
["Sec. 805. Appellate court review.
["Sec. 806. Delegation of functions.
["Sec. 807. Subpena power; authority to hold hearings.
["Sec. 808. Compensation of Director of Office of Justice Assistance, Research, and Statistics.
["Sec. 809. Compensation of other Federal officers.
["Sec. 810. Employment of hearing officers.
["Sec. 811. Authority to use available services.
["Sec. 812. Consultation with other Federal, State, and local officials.
["Sec. 813. Reimbursement authority.
["Sec. 814. Services of experts and consultants; advisory committees.
["Sec. 815. Prohibition of Federal control over State and local criminal justice agencies.
["Sec. 816. Report to President and Congress.
["Sec. 817. Recordkeeping requirement.
["Sec. 818. Confidentiality of information.
["Sec. 819. Authority to accept voluntary services.
["Sec. 820. Administration of juvenile delinquency programs.
["Sec. 821. Prohibition on land acquisition.
["Sec. 822. Prohibition on use of CIA services.
["Sec. 823. Indian liability waiver.
["Sec. 824. District of Columbia matching fund source.
["Sec. 825. Limitation on civil justice matters.
["Sec. 826. Reimbursement for unused equipment.
["Sec. 827. Prison industry enhancement.

["PART I—DEFINITIONS

["Sec. 901. Definitions.

["PART J—FUNDING

["Sec. 1001. Authorization of appropriations.
["Sec. 1002. Maintenance of effort.
["Sec. 1003. Authorization of appropriations for Office of Anti-Crime Programs.

["PART K—CRIMINAL PENALTIES

["Sec. 1101. Misuse of Federal assistance.
["Sec. 1102. Falsification or concealment of facts.
["Sec. 1103. Conspiracy to commit offense against United States.

["PART L—PUBLIC SAFETY OFFICERS' DEATH BENEFITS

["Sec. 1201. Payments.
["Sec. 1202. Limitations.
["Sec. 1203. Definitions.
["Sec. 1204. Administrative provisions.

["PART M—TRANSITION—EFFECTIVE DATE—REPEALER

["Sec. 1301. Continuation of rules, authorities, and proceedings.]

["DECLARATION AND PURPOSE

["The Congress finds and declares that the high incidence of crime in the United States is detrimental to the general welfare of the Nation and its citizens, and that criminal justice efforts must be better coordinated, intensified, and made more effective and equitable at all levels of government.

[“Congress further finds that juvenile delinquency constitutes a growing threat to the national welfare requiring immediate and comprehensive action by the Federal Government to reduce and prevent delinquency by developing and implementing effective programs to improve the quality of juvenile justice in the United States.

[“Congress further finds that there is an urgent need to encourage basic and applied research, to gather and disseminate accurate and comprehensive justice statistics, and to evaluate methods of preventing and reducing crime.

[“Congress further finds that although crime is essentially a local problem that must be dealt with by State and local governments, the financial and technical resources of the Federal Government should be made available to support such State and local efforts.

[“Congress further finds that the future welfare of the Nation and the well-being of its citizens depend on the establishment and maintenance of viable and effective justice systems which require: (1) systematic and sustained action by Federal, State, and local governments; (2) greater continuity in the scope and level of Federal assistance; and (3) continuing efforts at all levels of government to streamline programs and upgrade the functioning of agencies responsible for planning, implementing and evaluating efforts to improve justice systems.

[“It is therefore the declared policy of the Congress to aid State and local governments in strengthening and improving their systems of criminal justice by providing financial and technical assistance with maximum certainty and minimum delay. It is the purpose of this title to (1) authorize funds for the benefit of States and units of local government to be used to strengthen their criminal justice system; (2) develop and fund new methods and programs to enhance the effectiveness of criminal justice agencies; (3) support the development of city, county, and statewide priorities and programs to meet the problems confronting the justice system; (4) reduce court congestion and trial delay; (5) support community anticrime efforts; (6) improve and modernize the correctional system; (7) encourage the undertaking of innovative projects of recognized importance and effectiveness; (8) encourage the development of basic and applied research directed toward the improvement of civil and criminal justice systems and new methods for the prevention and reduction of crime and the detection, apprehension, and rehabilitation of criminals; (9) encourage the collection and analysis of statistical information concerning crime, juvenile delinquency, civil disputes, and the operation of justice systems; and (10) support manpower development and training efforts. It is further the policy of the Congress that the Federal assistance made available under this title not be utilized to reduce the amount of State and local financial support for criminal justice activities below the level of such support prior to the availability of such assistance.

[“PART A—LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

[“ESTABLISHMENT OF LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

[“SEC. 101. There is hereby established within the Department of Justice under the general authority of the Attorney General, a Law Enforcement Assistance Administration (hereinafter referred to in this title as the ‘Administration’). The Administration shall be under the direction of an Administrator, who shall be appointed by the President, by and with the advice and consent of the Senate, and such other Deputy Administrators as may be designated by the Attorney General. The Administrator shall have final authority over all grants, cooperative agreements, and contracts awarded by the Administration.

[“DUTIES AND FUNCTIONS OF ADMINISTRATOR

[“SEC. 102. The Administrator shall—

[“(1) provide funds to eligible States and units of local government pursuant to part D;

[“(2) recognize national criminal justice priorities established in accordance with parts E and F, inform States and units of local government concerning such priorities and award and allocate funds and technical assistance among the eligible States, units of local government, and public and private nonprofit organizations according to the criteria and on the terms and conditions determined by the Administration to be consistent with parts E and F;

[“(3) publish and disseminate information on the condition and progress of the criminal justice system;

[“(4) establish and carry on a specific and continuing program of cooperation with the States and units of local government designed to encourage and promote consultation and coordination concerning decisions made by the Administration affecting State and local criminal justice priorities;

[“(5) cooperate with and render technical assistance to States, units of local government, and other public and private organizations or international agencies involved in criminal justice activities;

[“(6) cooperate with and render technical assistance to States, units of local government, and other public and private organizations or agencies involved in victim-witness assistance activities and the post-arrest identification and prosecution of career criminals;

[“(7) provide funds and technical assistance to eligible jurisdictions under this title for the development of operational information and telecommunications systems;

[“(8) exercise the powers and functions set out in part H; and

[“(9) exercise such other powers and functions as may be vested in the Administrator pursuant to this title.

["OFFICE OF COMMUNITY ANTI-CRIME PROGRAMS

["SEC. 103. (a) There is established in the Law Enforcement Assistance Administration the Office of Community Anti-Crime Programs (hereinafter in this section referred to as the 'Office'). The Office shall be under the direction of the Administrator and shall—

["(1) provide appropriate technical assistance to community and citizens groups to enable such groups to—

["(A) apply for grants which encourage community and citizen participation in crime prevention and criminal justice activities;

["(B) participate in the formula grant application process pursuant to section 402(f) of this title;

["(C) provide program development and encouragement of neighborhood and community participation in crime prevention and public safety efforts; and

["(D) implement programs and projects assisted with grants under subsection (b).

["(2) coordinate its activities with other Federal agencies and programs, including the Community Relations Service of the Department of Justice, which are designed to encourage and assist citizen participation in criminal justice activities;

["(3) provide information on successful programs of citizen and community participation to citizen and community groups;

["(4) review, at its discretion, formula grant applications submitted under section 403 of this title in order to assure that the requirements for citizen, neighborhood, and community participation in the application process have been met; and

["(5) make recommendations, after consultation with citizen, neighborhood, and community organizations, for the designation of effective community anticrime programs for funding as national priority grants under part E and discretionary grants under part F.

["(b) The Administration is authorized to make grants to be administered by the Office of Community Anti-Crime Programs to community and citizen groups, which grants shall be used—

["(1) to enable the community to engage in a process leading to the identification of problems facing that community with respect to crime or conflicts, disputes, and other problems that might lead to crime;

["(2) to provide for the consideration by the community of plans to alleviate such problems with special attention to projects that—

["(A) have been successful in other communities in dealing with the same or similar problems;

["(B) provide alternatives to the criminal justice system in resolving conflicts and disputes and in repairing the injuries suffered;

["(C) promote increased citizen participation and confidence in the processes used to resolve conflicts and disputes; and

["(D) address the social and economic causes of crime.

["(3) to enable community and citizen groups to participate in assistance programs under this title, but no grant under this section may be used principally to seek technical assistance or a grant under this title;

[“(4) to conduct training of community groups in the management of grants and such other skills as the Office determines are necessary to enhance the involvement of neighborhoods and citizens in community crime prevention and dispute resolution projects; and

[“(5) to carry out projects determined to be likely to alleviate the community's crime problems as identified through the process set forth in this subsection.

[“(c) In carrying out the functions under this part the Administrator shall make appropriate provisions for coordination among neighborhoods and for consultation with locally elected officials.

[“Part B—National Institute of Justice

[“NATIONAL INSTITUTE OF JUSTICE

[“Sec. 201. It is the purpose of this part to establish a National Institute of Justice, which shall provide for and encourage research and demonstration efforts for the purpose of—

[“(1) improving Federal, State, and local criminal justice systems and related aspects of the civil justice system;

[“(2) preventing and reducing crimes;

[“(3) insuring citizen access to appropriate dispute-resolution forums;

[“(4) improving efforts to detect, investigate, prosecute, and otherwise combat and prevent white-collar crime and public corruption; and

[“(5) identifying programs of proven effectiveness, programs having a record of proven success, or programs which offer a high probability of improving the functioning of the criminal justice system.

The Institute shall have authority to engage in and encourage research and development to improve and strengthen the criminal justice system and related aspects of the civil justice system and to disseminate the results of such efforts to Federal, State, and local governments, to develop alternatives to judicial resolution of disputes, to evaluate the effectiveness of programs funded under this title, to develop new or improved approaches and techniques, to improve and strengthen the administration of justice, and to identify programs or projects carried out under this title which have demonstrated success in improving the quality of justice systems and which offer the likelihood of success if continued or repeated. In carrying out the provisions of this part, the Institute shall give primary emphasis to the problems of State and local justice systems and shall insure that there is a balance between basic and applied research.

[“ESTABLISHMENT, DUTIES, AND FUNCTIONS

[“Sec. 202. (a) There is established within the Department of Justice, under the general authority of the Attorney General, a National Institute of Justice (hereinafter referred to in this part as the ‘Institute’).

[“(b) The Institute shall be headed by a Director appointed by the President, by and with the advice and consent of the Senate. The Director shall have had experience in justice research. The Director shall have final authority over all grants, cooperative agreements, and contracts awarded by the Institute. The Director shall not engage in any other employment than that of serving as Director; nor shall the Director hold any office in, or act in any capacity for, any organization, agency, or institution with which the Institute makes any contract or other arrangement under this title.

[“(c) The Institute is authorized to—

[“(1) make grants to, or enter into cooperative agreement or contracts with, public agencies, institutions of higher education, private organizations, or individuals to conduct research, demonstrations, or special projects pertaining to the purposes described in this part, and provide technical assistance and training in support of tests, demonstrations, and special projects;

[“(2) conduct or authorize multiyear and short-term research and development concerning the criminal and civil justice systems in an effort—

[“(A) to identify alternative programs for achieving system goals, including programs authorized by section 103 of this title;

[“(B) to provide more accurate information on the causes and correlates of crime;

[“(C) to analyze the correlates of crime and juvenile delinquency and provide more accurate information on the causes and correlates of crime and juvenile delinquency;

[“(D) to improve the functioning of the criminal justice system;

[“(E) to develop new methods for the prevention and reduction of crime, the prevention and reduction of parental kidnaping, including the development of programs to facilitate cooperation among the States and units of local government, the detection and apprehension of criminals, the expeditious, efficient, and fair disposition of criminal and juvenile delinquency cases, the improvement of police and minority relations, the conduct of research into the problems of victims and witnesses of crime, the feasibility and consequences of allowing victims to participate in criminal justice decisionmaking, the feasibility and desirability of adopting procedures and programs which increase the victim's participation in the criminal justice process, the reduction in the need to seek court resolution of civil disputes, and the development of adequate corrections facilities and effective programs of correction; and

[“(F) to develop programs and projects to improve and expand the capacity of States and units of local government and combinations of such units, to detect, investigate, prosecute, and otherwise combat and prevent white-collar crime and public corruption, to improve and expand cooperation among the Federal Government, States, and units of local government in order to enhance the overall criminal justice system response to white-collar crime and public corruption, and to foster the creation and implementation of a comprehensive national strategy to prevent and combat white-collar crime and public corruption.

In carrying out the provisions of this subsection, the Institute may request the assistance of both public and private research agencies;

["(3) evaluate the effectiveness of projects or programs carried out under this part;

["(4) evaluate, where the Institute deems appropriate, the programs and projects carried out under other parts of this title to determine their impact upon the quality of criminal and civil justice systems and the extent to which they have met or failed to meet the purposes and policies of this title, and disseminate such information to State agencies and, upon request, to units of local government and other public and private organizations and individuals;

["(5) make recommendations for action which can be taken by Federal, State, and local governments and by private persons and organizations to improve and strengthen criminal and civil justice systems;

["(6) provide research fellowships and clinical internships and carry out programs of training and special workshops for the presentation and dissemination of information resulting from research, demonstrations, and special projects including those authorized by this part;

["(7) collect and disseminate information obtained by the Institute or other Federal agencies, public agencies, institutions of higher education, and private organizations relating to the purposes of this part;

["(8) serve as a national and international clearinghouse for the exchange of information with respect to the purposes of this part;

["(9) submit a biennial report to the President and Congress on the state of justice research. This report shall describe significant achievements and identify areas needing further study. Other Federal agencies involved in justice research shall assist, upon request, in the preparation of this report;

["(10) after consultation with appropriate agencies and officials of States and units of local government, make recommendations for the designation of programs or projects which will be effective in improving the functioning of the criminal justice system, for funding as national priority grants under part E and discretionary grants under part F; and

["(11) encourage, assist, and serve in a consulting capacity to Federal, State, and local justice system agencies in the development, maintenance, and coordination of criminal and civil justice programs and services.

["(d) To insure that all criminal and civil justice research is carried out in a coordinated manner, the Director is authorized to—

["(1) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

[“(2) confer with and avail itself of the cooperation, services, records, and facilities of State or of municipal or other local agencies;

[“(3) request such information, data, and reports from any Federal agency as may be required to carry out the purposes of this section, and the agencies shall provide such information to the Institute as required to carry out the purposes of this part;

[“(4) seek the cooperation of the judicial branches of Federal and State Government in coordinating civil and criminal justice research and development; and

[“(5) exercise the powers and functions set out in part H.

[“AUTHORITY FOR 100 PER CENTUM GRANTS

[“SEC. 203. A grant authorized under this part may be up to 100 per centum of the total cost of each project for which such grant is made. The Institute shall require, whenever feasible, as a condition of approval of a grant under this part, that the recipient contribute money, facilities, or services to carry out the purposes for which the grant is sought.

[“NATIONAL INSTITUTE OF JUSTICE ADVISORY BOARD

[“SEC. 204. (a) There is hereby established a National Institute of Justice Advisory Board (hereinafter in this section referred to as the ‘Board’). The Board shall consist of twenty-one members who shall be appointed by the President. The members shall represent the public interest and should be experienced in the criminal or civil justice systems, including, representatives of States and units of local government, representatives of police, prosecutors, defense attorneys, courts, corrections, experts in the area of victim and witness assistance and other components of the justice system at all levels of government, representatives of professional organizations, representatives of the academic and research community, members of the business community, officials of neighborhood and community organizations, and the general public. A majority of the members of the Board, including the Chairman and Vice Chairman, shall not be full-time employees of Federal, State, or local governments. The Board, by majority vote, shall elect from among its members a Chairman and Vice Chairman. The Vice Chairman is authorized to sit and act in the place of the Chairman in the absence of the Chairman. The Director shall also be a nonvoting member of the Board and shall not serve as Chairman or Vice Chairman. Vacancies in the membership of the Board shall not affect the power of the remaining members to execute the functions of the Board and shall be filled in the same manner as in the case of the original appointment. The Chairman shall be provided by the Institute with at least one full-time staff assistant to assist the Board. The Administrator of the Law Enforcement Assistance Administration, the Administrator of the Office of Juvenile Justice and Delinquency Prevention, and the Director of the Bureau of Justice Statistics shall serve as nonvoting ex officio members of the Board and shall be ineligible to serve as Chairman or Vice Chairman. Except as otherwise provided herein, no more than one additional full-time Federal officer or employee shall serve as a member of the Board.

[“(b) The Board, after appropriate consultation with representatives of State and local governments, may make such rules respecting its organization and procedures as it deems necessary, except that no recommendation shall be reported from the Board unless a majority of the Board assents.

[“(c) The term of office of each member of the Board appointed under subsection (a) shall be three years except the first composition of the Board which shall have one-third of these members appointed to one-year terms, one-third to two-year terms, and one-third to three-year terms; and any such member appointed to fill a vacancy occurring prior to the expiration of the term for which his or her predecessor was appointed shall be appointed for the remainder of such term. Such members shall be appointed within ninety days after the date of enactment of the Justice System Improvement Act of 1979. The members of the Board appointed under subsection (a) shall receive compensation for each day engaged in the actual performance of duties vested in the Board at rates of pay not in excess of the daily equivalent of the highest rate of basic pay then payable in the General Schedule of section 5332(a) of title 5, United States Code, and in addition shall be reimbursed for travel, subsistence, and other necessary expenses. No voting member shall serve for more than two consecutive terms.

[“(d) The Board shall—

[“(1) recommend the policies and priorities of the Institute;

[“(2) create, where necessary, formal peer review procedures over selected categories of grants, cooperative agreements, and contracts;

[“(3) recommend to the President at least three candidates for the position of Director of the Institute in the event of a vacancy; and

[“(4) undertake such additional related tasks as the Board may deem necessary.

[“(e) In addition to the powers and duties set forth elsewhere in this title, the Director shall exercise such powers and duties of the Board as may be delegated to the Director by the Board.

[“Part C—Bureau of Justice Statistics

[“BUREAU OF JUSTICE STATISTICS

[“Sec. 301. It is the purpose of this part to provide for and encourage the collection and analysis of statistical information concerning crime (including white-collar crime and public corruption), juvenile delinquency, and the operation of the criminal justice system and related aspects of the civil justice system and to support the development of information and statistical systems at the Federal, State, and local levels to improve the efforts of these levels of government to measure and understand the levels of crime (including crimes against the elderly, white-collar crime, and public corruption), juvenile delinquency, and the operation of the criminal justice system and related aspects of the civil justice system. The Bureau shall utilize to the maximum extent feasible

State governmental organizations and facilities responsible for the collection and analysis of criminal justice data and statistics. In carrying out the provisions of this part, the Bureau shall give primary emphasis to the problems of State and local justice systems.

[“ESTABLISHMENT, DUTIES, AND FUNCTIONS

[“SEC. 302. (a) There is established within the Department of Justice, under the general authority of the Attorney General, a Bureau of Justice Statistics (hereinafter referred to in this part as ‘Bureau’).

[“(b) The Bureau shall be headed by a Director appointed by the President, by and with the advice and consent of the Senate. The Director shall have had experience in statistical programs. The Director shall have final authority for all grants, cooperative agreements, and contracts awarded by the Bureau. The Director shall not engage in any other employment than that of serving as Director; nor shall the Director hold any office in, or act in any capacity for, any organization, agency, or institution with which the Bureau makes any contract or other arrangement under this Act.

[“(c) The Bureau is authorized to—

[“(1) make grants to, or enter into cooperative agreements or contracts with public agencies, institutions of higher education, private organizations, or private individuals for purposes related to this part; grants shall be made subject to continuing compliance with standards for gathering justice statistics set forth in rules and regulations promulgated by the Director;

[“(2) collect and analyze information concerning criminal victimization, including crimes against the elderly, and civil disputes;

[“(3) collect and analyze data that will serve as a continuous and comparable national social indication of the prevalence, incidence, rates, extent, distribution, and attributes of crime, juvenile delinquency, civil disputes, and other statistical factors related to crime, civil disputes, and juvenile delinquency, in support of national, state, and local justice policy and decisionmaking;

[“(4) collect and analyze statistical information, concerning the operations of the criminal justice system at the Federal, State, and local levels;

[“(5) collect and analyze statistical information concerning the prevalence, incidence, rates, extent, distribution, and attributes of crime, and juvenile delinquency, at the Federal, State, and local levels;

[“(6) analyze the correlates of crime, civil disputes and juvenile delinquency, by the use of statistical information, about criminal and civil justice systems at the Federal, State, and local levels, and about the extent, distribution and attributes of crime, and juvenile delinquency, in the Nation and at the Federal, State, and local levels;

[“(7) compile, collate, analyze, publish, and disseminate uniform national statistics concerning all aspect of criminal justice and related aspects of civil justice, crime, including crimes against the elderly, juvenile delinquency, criminal offenders, juvenile delinquents, and civil disputes in the various States;

["(8) recommend national standards for justice statistics and for insuring the reliability and validity of justice statistics supplied pursuant to this title;

["(9) maintain liaison with the judicial branches of the Federal and State Governments in matters relating to justice statistics, and cooperate with the judicial branch in assuring as much uniformity as feasible in statistical systems of the executive and judicial branches;

["(10) provide information to the President, the Congress, the judiciary, State and local governments, and the general public on justice statistics;

["(11) establish or assist in the establishment of a system to provide State and local governments with access to Federal informational resources useful in the planning, implementation, and evaluation of programs under this Act;

["(12) conduct or support research relating to methods of gathering or analyzing justice statistics;

["(13) provide financial and technical assistance to the States and units of local government relating to collection, analysis, or dissemination of justice statistics;

["(14) maintain liaison with State and local governments and governments of other nations concerning justice statistics;

["(15) cooperate in and participate with national and international organizations in the development of uniform justice statistics;

["(16) insure conformance with security and privacy regulations issued pursuant to section 818; and

["(17) exercise the powers and functions set out in part H.

["(d) To insure that all justice statistical collection, analysis, and dissemination is carried out in a coordinated manner, the Director is authorized to—

["(1) utilize, with their consent, the services, equipment, records, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

["(2) confer and cooperate with State, municipal, and other local agencies;

["(3) request such information, data, and reports from any Federal agency as may be required to carry out the purposes of this title; and

["(4) seek the cooperation of the judicial branch of the Federal Government in gathering data from criminal justice records.

["(e) Federal agencies requested to furnish information, data, or reports pursuant to subsection (d)(3) shall provide such information to the Bureau as is required to carry out the purposes of this section.

["(f) In recommending standards for gathering justice statistics under this section, the Director shall consult with representatives of State and local government, including, where appropriate, representatives of the judiciary.

[“AUTHORITY FOR 100 PER CENTUM GRANTS

[“SEC. 303. A grant authorized under this part may be up to 100 per centum of the total cost of each project for which such grant is made. The Bureau shall require, whenever feasible as a condition of approval of a grant under this part, that the recipient contribute money, facilities, or services to carry out the purposes for which the grant is sought.

[“BUREAU OF JUSTICE STATISTICS ADVISORY BOARD

[“SEC. 304. (a) There is hereby established a Bureau of Justice Statistics Advisory Board (hereinafter referred to in this section as the ‘Board’). The Board shall consist of twenty-one members who shall be appointed by the Attorney General. The members should include representatives of States and units of local government, representatives of police, prosecutors, defense attorneys, courts, corrections, experts in the area of victim and witness assistance, and other components of the justice system at all levels of government, representatives of professional organizations, members of the academic, research, and statistics community, officials of neighborhood and community organizations, members of the business community, and the general public. The Board, by majority vote, shall elect from among its members a Chairman and Vice Chairman. The Vice Chairman is authorized to sit and act in the place of the Chairman in the absence of the Chairman. The Director shall also be a non-voting member of the Board and shall not serve as Chairman or Vice Chairman. Vacancies in the membership of the Board shall not affect the power of the remaining members to execute the functions of the Board and shall be filled in the same manner as in the case of the original appointment. The Chairman shall be provided by the Bureau with at least one full-time staff assistant to assist the Board. The Administrator of the Law Enforcement Assistance Administration, the Administrator of the Office of Juvenile Justice and Delinquency Prevention, the Director of the National Institute of Justice, and the Director of the Bureau of Justice Statistics shall serve as non-voting ex officio members of the Board but shall be ineligible to serve as Chairman or Vice Chairman. Except as otherwise provided herein, no more than one additional full-time Federal officer or employee shall serve as a member of the Board.

[“(b) The Board, after appropriate consultation with representatives of State and local governments, may make such rules respecting its organization and procedures as it deems necessary, except that no recommendation shall be reported from the Board unless a majority of the Board assents.

[“(c) The term of office of each member of the Board appointed under subsection (a) shall be three years except the first composition of the Board which shall have one-third of these members appointed to one-year terms, one-third to two-year terms, and one-third to three-year terms; and any such member appointed to fill a vacancy occurring prior to the expiration of the term for which his or her predecessor was appointed shall be appointed for the remainder of such term. The members of the Board appointed under subsection (a) shall receive compensation for each day engaged in the actual performance of duties vested in the Board at rates of pay not in excess of the daily equivalent of the highest rate of basic pay then payable under the General Schedule of section 5332(a) of title 5. United States Code, and in addition shall be reimbursed for travel, subsistence, and other necessary expenses. No voting member shall serve for more than two consecutive terms.

[“(d) The Board shall—

[“(1) review and make recommendations to the Bureau on activities undertaken by the Bureau and formulate and recommend to the Director policies and priorities for the Bureau;

[“(2) recommend to the President at least three candidates for the position of Director of the Bureau in the event of a vacancy; and

[“(3) carry out such additional related functions as the Board may deem necessary.

[“(e) In addition to the powers and duties set forth elsewhere in this title, the Director shall exercise such powers and duties of the Board as may be delegated to the Director by the Board.

[“USE OF DATA

[“SEC. 305. Data collected by the Bureau shall be used only for statistical or research purposes, and shall be gathered in a manner that precludes their use for law enforcement or any purpose relating to a particular individual other than statistical or research purposes.

[“PART D—FORMULA GRANTS

[“DESCRIPTION OF PROGRAM

[“SEC. 401. (a) It is the purpose of this part to assist States and units of local government in carrying out specific innovative programs which are of proven effectiveness, have a record of proven success, or which offer a high probability of improving the functioning of the criminal justice system. The Administration is authorized to make grants under this part to States and units of local government for the purpose of—

[“(1) establishing or expanding community and neighborhood programs that enable citizens to undertake initiatives to deal with crime and delinquency;

[“(2) improving and strengthening law enforcement agencies, as measured by arrest rates, incidence rates, victimization rates, the number of reported crimes, clearance rates, the number of patrol or investigative hours per uniformed officer, or any other appropriate objective measure;

[“(3) improving the police utilization of community resources through support of joint police-community projects designed to prevent or control neighborhood crime;

[“(4) disrupting illicit commerce in stolen goods and property and training of special investigative and prosecuting personnel, and the development of systems for collecting, storing, and disseminating information relating to the control of organized crime;

[“(5) combating arson;

[“(6) developing investigations and prosecutions of white-collar crime, organized crime, public-corruption-related offenses, and fraud against the government;

[“(7) reducing the time between arrest or indictment and disposition of trial;

[“(8) implementing court reforms;

[“(9) increasing the use and development of alternatives to the prosecution of selected offenders;

[“(10) increasing the development and use of alternatives to pretrial detention that assure return to court and a minimization of the risk of danger;

[“(11) increasing the rate at which prosecutors obtain convictions against habitual, nonstatus offenders;

[“(12) developing and implementing programs which provide assistance to victims, witnesses, and jurors, including restitution by the offender, programs encouraging victim and witness participation in the criminal justice system, and programs designed to prevent retribution against or intimidation of witnesses by persons charged with or convicted of crimes;

[“(13) providing competent defense counsel for indigent and eligible low-income persons accused of criminal offenses;

[“(14) developing projects to identify and meet the needs of drug dependent offenders;

[“(15) increasing the availability and use of alternatives to maximum-security confinement of convicted offenders who pose no threat to public safety;

[“(16) reducing the rates of violence among inmates in places of detention and confinement;

[“(17) improving conditions of detention and confinement in adult and juvenile correctional institutions, as measured by the number of such institutions administering programs meeting accepted standards;

[“(18) training criminal justice personnel in programs meeting standards recognized by the Administrator;

[“(19) revision and recodification by States and units of local government of criminal statutes, rules, and procedures and revision of statutes, rules, and regulations governing State and local criminal justice agencies;

[“(20) coordinating the various components of the criminal justice system to improve the overall operation of the system, establishing criminal justice information systems, and supporting and training of criminal justice personnel;

[“(21) developing statistical and evaluation systems in States and units of local government which assist the measurement of indicators in each of the areas described in paragraphs (1) through (20);

[“(22) encouraging the development of pilot and demonstration projects for prison industry programs at the State level with particular emphasis on involving private sector enterprise either as a direct participant in such programs, or as purchasers of goods produced through such programs, and aimed at making inmates self-sufficient, to the extent practicable, in a realistic working environment; and

["(23) any other innovative program which is of proven effectiveness, has a record of proven success, or which offers a high probability of improving the functioning of the criminal justice system.

["(b)(1) Except with respect to allocations under subsection (c)—

["(A) for the fiscal year ending September 30, 1980, the Federal portion of any grant made under this part may be up to 100 per centum of the cost of the program or project specified in the application for such grant; and

["(B) for any later fiscal period, that portion of a Federal grant made under this section may be up to 90 percentum of the cost of the program or project specified in the application for such grant unless the Administrator determines that State or local budgetary restraints prevent the recipient from providing the remaining portion.

["(2)(A) The non-Federal portion of the cost of such program or project shall be in cash.

["(B) In the case of a grant to an Indian tribe or other aboriginal group, the Administration may increase the Federal portion of the cost of such program to the extent the Administration deems necessary, if the Administration determines that the tribe or group does not have sufficient funds available to meet the non-Federal portion of such cost.

["(3) Except with respect to allocations under subsection (c), a grant recipient shall assume the cost of a program or project funded under this part after a reasonable period of Federal assistance unless the Administrator determines that the recipient is unable to assume such cost because of State or local budgetary restraints.

["(c)(1) The Administration shall allocate from the grant provided for in subsection (a) $200,000 to each of the States for the purposes of administering grants received under this title for operating criminal justice councils, judicial coordinating committees, and local offices pursuant to part D, and an additional amount of at least $50,000 shall be made available by the Administration for allocation by the State to the judicial coordinating committee. These foregoing sums shall be available without a requirement for match. The Administration shall allocate additional funds from the grant to a State for use by the State and its units of local government in an amount that is 7½ per centum of the total grant of such State. Any of the additional funds shall be matched in an amount equal to any such expended or obligated amount. An amount equal to at least 7½ per centum of the allocation of an eligible jurisdiction as defined in section 402(a) (2), (3), or (4), or of a judicial coordinating committee, must be made available by the State to each such jurisdiction or judicial coordinating committee from these additional funds for purposes set out above. The eligible jurisdiction or combination thereof shall match the amounts passed through in an amount equal to any such amount expended or obligated by the eligible jurisdiction or combination thereof for the purposes set forth above for all Federal funds in excess of $25,000 for each eligible jurisdiction.

["(2) Any funds allocated to States or units of local government and unexpended by such States or units of local government for the purposes set forth above shall be available to such States or units of local government for expenditure in accordance with subsection (a).

[“(3) The State may allocate at its discretion to units of local government or combinations of such units which are not eligible jurisdictions as defined in section 402(a) (2), (3), and (4) funds provided under this subsection.

[“ELIGIBILITY

[“SEC. 402. (a) The Administration is authorized to make financial assistance under this part available to an eligible jurisdiction to enable it to carry out all or a substantial part of a program or project submitted and approved in accordance with the provisions of this title. An eligible jurisdiction shall be—

[“(1) a State;

[“(2) a municipality which has no less than 0.15 per centum of total State and local criminal justice expenditures, and which has a population of one hundred thousand or more persons on the basis of this most satisfactory current data available on a nationwide basis to the Administration but only if such municipality would receive at least $50,000 for the applicable year under section 405;

[“(3) a county which has no less than 0.15 per centum of total State and local criminal justice expenditures, and which has a population of one hundred thousand or more persons on the basis of the most satisfactory current data available on a nationwide basis to the Administration but only if such county would receive at least $50,000 for the applicable year under section 405;

[“(4) any combination of contiguous units of local government, whether or not situated in more than one State, or any combination of units of local government all in the same county, which has a population of one hundred thousand or more persons on the basis of the most satisfactory current data available on a nationwide basis to the Administration but only if such combination would receive at least $50,000 for the applicable year under section 405;

[“(5) a unit of local government, or any combination of such contiguous units without regard to population, which are otherwise ineligible under the other paragraphs of this subsection.

[“(b)(1) Each State shall establish or designate and maintain a criminal justice council (hereinafter referred to in this title as the ‘council’) for the purpose of—

[“(A) analyzing the criminal justice problems within the State based on input and data from all eligible jurisdictions, State agencies, and the judicial coordinating committee and establishing priorities based on the analysis and assuring that these priorities are published and made available to affected criminal justice agencies prior to the time required for application submission;

[“(B) preparing a comprehensive State application reflecting the statewide goals, objectives, priorities, and projected grant programs;

[“(C)(i) receiving, reviewing, and approving (or disapproving) applications or amendments submitted by State agencies, the judicial coordinating committee, and units of local government, or combinations thereof, as defined in subsection (a)(5), pursuant to section 405(a)(5) of this title; and

[“(ii) providing financial assistance to these agencies and units according to the criteria of this title and on the terms and conditions established by such council at its discretion;

[“(D) receiving, coordinating, reviewing, and monitoring all applications or amendments submitted by State agencies, the judicial coordinating committee, units of local government, and combinations of such units pursuant to section 403 of this title, recommending ways to improve the effectiveness of the programs or projects referred to in said applications, assuring compliance of said applications with Federal requirements and State law and integrating said applications into the comprehensive State application;

[“(E) preparing an annual report for the chief executive of the State and the State legislature containing an assessment of the criminal justice problems and priorities within the State; the adequacy of existing State and local agencies, programs, and resources to meet these problems and priorities; the distribution and use of funds allocated pursuant to this part and the relationship of these funds to State and local resources allocated to crime and justice system problems; and the major policy and legislative initiatives that are recommended to be undertaken on a statewise basis;

[“(F) assisting the chief executive of the State, the State legislature, and units of local government upon request in developing new or improved approaches, policies, or legislation designed to improve criminal justice in the State;

[“(G) developing and publishing information concerning criminal justice in the State;

[“(H) providing technical assistance upon request to State agencies, community-based crime prevention programs, the judicial coordinating committee, and units of local government in matters relating to improving criminal justice in the State; and

[“(I) assuring fund accounting, auditing, and evaluation of programs and projects funded under this part to assure compliance with Federal requirements and State law.

[“(2) The council shall be created or designated by State law and shall be subject to the jurisdiction of the chief executive of the State who shall appoint the members of the council, designate the chairman, and provide professional, technical, and clerical staff to serve the council. The council shall be broadly representative and include among its membership—

[“(A) representatives of eligible jurisdictions as defined in subsection (a) (2), (3), and (4) who shall comprise at least one-third of the membership of the council where there are such eligible jurisdictions in the State and where they submit applications pursuant to this part;

[“(B) representatives of the smaller units of local government defined in subsection (a)(5);

[“(C) representatives of the various components of the criminal justice system, including representatives of agencies directly related to the prevention and control of juvenile delinquency and representatives of police, courts, corrections, prosecutors, and defense attorneys;

[“(D) representatives of the general public including representatives of neighborhood and community-based, business, and professional organizations of the communities to be served under this part; and

[“(E) representatives of the judiciary including, at a minimum, the chief judicial officer or other officer of the court of last resort, the chief judicial administrative officer or other appropriate judicial administrative officer of the State, and a local trial court judicial officer; if the chief judicial officer or chief judicial administrative officer cannot or does not choose to serve, the other judicial members and the local trial court judicial officer shall be selected by the chief executive of the State from a list of no less than three nominees for each position submitted by the chief judicial officer of the court of last resort within thirty days after the occurrence of any vacancy in the judicial membership; additional judicial members of the council as may be required by the Administration shall be appointed by the chief executive of the State from the membership of the judicial coordinating committee or, in the absence of a judicial coordinating committee, from a list of no less than three nominees for each position submitted by the chief judicial officer of the court of last resort.

Individual representatives may fulfill the requirements of more than one functional area or geographical area where appropriate to the background and expertise of the individual.

[“(3)(A) Applications from eligible jurisdictions as defined in subsection (a) (2), (3), and (4) may, at the discretion of such eligible jurisdiction, be in the form of a single application to the State for inclusion in the comprehensive State application. Applications or amendments should conform to the overall priorities, unless the eligible jurisdiction's analysis of its criminal justice system demonstrates that such recommended priorities are inconsistent with their needs. Applications or amendments should conform to uniform administrative requirements for submission of applications. Such requirements shall be consistent with guidelines issued by the Administration. Such application or amendments shall be deemed approved unless the council, within ninety days of the receipt of such application or amendment, finds that the application or amendment—

[“(i) does not comply with Federal requirements or with State law or regulations;

[“(ii) is inconsistent with priorities and fails to establish, under guidelines issued by the Administration, good cause for such inconsistency;

[“(iii) conflicts with or duplicates programs or projects of another applicant under this title, or other Federal, State, or local supported programs or applications; or

[“(iv) proposes a program or project that is substantially identical to or is a continuation of a program or project which

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has been evaluated and found to be ineffective under section 404(c)(4).

Where the council finds such noncompliance, inconsistency, conflict, or duplication, it shall notify the applicant in writing and set forth its reasons for the finding.

["(B) The applicant may, within thirty days of receipt of written findings of the council pursuant to subparagraph (A) submit to the council a revised application or state in writing the applicant's reasons for disagreeing with the council's findings.

["(C) A revised application submitted under subparagraph (B) shall be treated as an original application except that the council shall act on such application within thirty days.

["(D) If an applicant states in writing a disagreement with the council's written findings as specified in subparagraph (A), the findings shall be considered appealed. The appeal shall be in accordance with a procedure developed by the council and reviewed and agreed to by the eligible jurisdiction. If any eligible jurisdiction in a State fails to agree with the council appeal process prior to application submission to the council, the appeal shall be in accordance with procedures developed by the Administration. The Administration appeal procedures shall provide that if the council's action is not supported by clear and convincing evidence or if the council acted arbitrarily or capriciously, the council shall be directed to reconsider or approve the application or amendment.

["(E) Approval of the application of such eligible local jurisdiction shall result in the award of funds to such eligible jurisdiction without requirement for further application or review by the council.

["(4) Applications from State agencies and eligible jurisdictions as defined in subsection (a)(5) must be in the manner and form proscribed by the council. Where the council determines under paragraph (1) (C) and (D) that an application or amendment from a State agency or an eligible jurisdiction as defined in subsection (a)(5)—

["(A) does not comply with Federal requirements or with State law or regulation;

["(B) is inconsistent with priorities, policy, organizational, or procedural arrangements, or the crime analysis;

["(C) conflicts with or duplicates programs or projects of another applicant under this title, or other Federal, State, or local supported programs or applications; or

["(D) proposes a program or project that is substantially identical to or is a continuation of a program or project which has been evaluated and found to be ineffective;

the council shall notify the applicant in writing of the finding and the reasons for the finding and may deny funding or recommend appropriate changes. Appeal of the council's action shall be in accordance with procedures established by the council for such matters.

["(c) The chief executive(s) of an eligible jurisdiction as defined in subsection (a)(2), (3) and (4) shall create or designate an office for the purpose of preparing and developing the jurisdiction's application and assuring that such application complies with Federal requirements, State law, fund accounting, auditing and the evalua-

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tion of programs and projects to be funded under the application to be submitted to the council pursuant to section 403 of this title. Each eligible jurisdiction shall establish or designate a local criminal justice advisory board (hereinafter referred to in this section as the 'board') for the purpose of—

[“(1) analyzing the criminal justice problems within the eligible jurisdiction and advising the council of the eligible jurisdiction on priorities;

[“(2) advising the chief executive of the eligible jurisdiction pursuant to this title;

[“(3) advising on applications or amendments by the eligible jurisdiction;

[“(4) assuring that there is an adequate allocation of funds for court programs based upon that proportion of the eligible jurisdiction's expenditures for court programs which contributes to the jurisdiction's eligibility for funds and which take into account the court priorities recommended by the judicial coordinating committees; and

[“(5) assuring that there is an adequate allocation of funds for correction programs based on that portion of the eligible jurisdiction's expenditures for correction programs which contributes to the jurisdiction's eligibility for funds.

Such board shall be established or designated by the chief executive of the eligible jurisdiction and shall be subject to the jurisdiction of the chief executive who shall appoint the members and designate the chairman. Such board shall be broadly representative of the various components of the criminal justice system and shall include among its membership representative of neighborhood, community-based and professional organization. In the case of an eligible jurisdiction as defined in subsection (a)(4), the membership of the board shall be jointly appointed in such manner as the chief executive of each unit of local government shall determine by mutual agreement. Decisions made by the board pursuant to this subsection may be reviewed and either be accepted or rejected by the chief executive of the eligible subgrant jurisdiction, or in the case of an eligible jurisdiction as defined in subsection (a)(4) in such manner as the chief executive of each unit of local government shall determine by mutual agreement. Where an eligible jurisdiction as defined in subsection (a) (2) or (3) chooses not to combine pursuant to section 402(a)(4) and chooses not to exercise the powers of this subsection, it shall be treated as an eligible jurisdiction under subsection (a)(5).

[“(d) The court of last resort of each State may establish or designate a judicial coordination committee (herinafter referred to in this title as the 'committee') for the preparation development, and revision of a three-year application or amendments thereto reflecting the needs and priorities of the courts of the State. For those States where there is a judicial agency which is authorized by State law on the date of enactment of this subsection to perform this function and which has a statutory membership of a majority of court officials (including judges and court administrators), the judicial agency may establish or designate the judicial coordinating committee. The committee shall—

[“(1) establish priorities for the improvement of the various courts of the State;

[“(2) define, develop, and coordinate programs and projects for the improvement of the courts of the State; and

[“(3) develop, in accordance with part D, an application for the funding of programs and projects designed to improve the functioning of the courts and judicial agencies of the State.

The committee shall submit its three-year application or amendments to the council. The committee shall review for consistency with the court priorities, applications, or amendments from any jurisdiction which has incurred expenditures for court services from its own sources or from any other jurisdiction which is applying for funds for court services. The committee shall report to the council and the applicant its findings of consistency and inconsistency. The council shall approve and incorporate into its application in whole or in part the application or amendments of the committee unless the council determines that such committee application or amendments are not in accordance with this title, are not in conformance with, or consistent with, their own application made pursuant to section 403 of this title, or do not conform with the fiscal accountability standards of this title.

[“(e)(1) The council will provide for procedures that will insure that all applications or amendments by units of local government or combinations thereof or judicial coordinating committees shall be acted upon no later than ninety days after being first received by the council. Final action by the council which results in the return of any application or amendments to an application must contain specific reasons for such action within ninety days of receipt of the application. Any part of such application or amendents which is not acted upon shall be deemed approved for submission to the Administration. Action by the council on any application or part thereof shall not preclude the resubmission of such application or part thereof to the council at a later date.

[“(2) The council, the judicial coordinating committee, and local boards, established pursuant to subsection (c), shall meet at such times and in such places as they deem necessary and shall hold each meeting open to the public, giving public notice of the time and place of such meeting, and the nature of the business to be transacted if final action is to be taken at the meeting on the State application or any application for funds or any amendment thereto. The council, the judicial coordinating committee, and local boards, pursuant to subsection (c), shall provide for public access to all records relating to their functions under this title, except such records as are required to be kept confidential by any other provision of local, State, or Federal law.

[“(3) The council shall, at a time designated in regulations promulgated by the Administration, submit its application made pursuant to this part to the Administration for approval. Its application shall include funding allocations or applications which were submitted by State agencies, the judicial coordinating committee, and units of local government, or combinations thereof, and which were first reviewed and approved by the council pursuant to subsection (b)(3), (b)(4), or (d), as appropriate.

[“(f) To be eligible for funds under this part all eligible jurisdictions shall assure the participation of citizens, and neighborhood and community organizations, in the application process. No grant may be made pursuant to this part unless the eligible jurisdiction has provided satisfactory assurances to the Administration that the applicant has—

[“(1) provided citizens and neighborhood and community organizations with adequate information concerning the amounts of funds available for proposed programs or projects under this title, the range of activities that may be undertaken, and other important program requirements;

[“(2) provided citizens and neighborhood and community organizations an opportunity to consider and comment on priorities set forth in the application or amendments;

[“(3) provided for full and adequate participation of units of local government in the performance of the analysis and the establishment of priorities required by subsection (b)(1)(A); and

[“(4) provided an opportunity for all affected criminal justice agencies to consider and comment on the proposed programs to be set forth in the application or amendments.

The Administrator, in cooperation with the Office of Community Anti-Crime Programs, may establish such rules, regulations, and procedures as are necessary to assure that citizens and neighborhood and community organizations will be assured an opportunity to participate in the application process.

[“APPLICATIONS

[“SEC. 403. (a) No grant may be made by the Administration to a State, or by a State to an eligible recipient pursuant to part D, unless the application sets forth criminal justice programs covering a three-year period which meet the objectives of section 401 of this title. This application must be amended annually if new programs are to be added to the application or if the programs contained in the original application are not implemented. The application must include—

[“(1) an analysis of the crime problems and criminal justice needs within the relevant jurisdiction and a description of the services to be provided and performance goals and priorities, including a specific statement of how the programs are expected to advance the objectives of section 401 of this title and meet the identified crime problems and criminal justice needs of the jurisdiction;

[“(2) an indication of how the programs relate to other similar State or local programs directed at the same or similar problems;

[“(3) an assurance that following the first fiscal year covered by an application and each fiscal year thereafter, the applicant shall submit to the administration, where the applicant is a State, and to the council where the applicant is a State agency, the judicial coordinating committees, a nongovernmental grantee, or a unit or combination of units of local government—

[“(A) a performance report concerning the activities carried out pursuant to this title; and

[“(B) an assessment by the applicant of the impact of those activities on the objectives of this title and the needs and objectives identified in the applicant's statement;

[“(4) a certification that Federal funds made available under this title will not be used to supplant State or local funds, but will be used to increase the amounts of such funds that would, in the absence of Federal funds, be made available for criminal justice activities;

[“(5) an assurance where the applicant is a State or unit or combination of units of local government that there is an adequate share of funds for courts and for corrections, police, prosecution, and defense programs;

[“(6) a provision for fund accounting, auditing, monitoring, and such evaluation procedures as may be necessary to keep such records as the Administration shall prescribe to assure fiscal control, proper management, and efficient disbursement of funds received under this title;

[“(7) a provision for the maintenance of such data and information and for the submission of such reports in such form, at such times, and containing such data and information as the Administration may reasonably require to administer other provisions of this title;

[“(8) a certification that its programs meet all the requirements of this section, that all the information contained in the application is correct, that there has been appropriate coordination with affected agencies, and that the applicant will comply with all provisions of this title and all other applicable Federal laws. Such certification shall be made in a form acceptable to the Administration and shall be executed by the chief executive officer or other officer of the applicant qualified under regulations promulgated by the Administration; and

[“(9) satisfactory assurances that equipment, whose purchase was previously made in connection with a program or project in such State assisted under this title and whose cost in the aggregate was $100,000 or more, has been put into use not later than one year after the date set at the time of purchase for the commencement of such use and has continued in use during its useful life.

[“(b) Applications for judicial coordinating committees, State agencies, and other nongovernmental grantees do not have to include the crime analysis required by subsection (a)(1) but may rely on the crime analysis prepared by the council.

[“REVIEW OF APPLICATIONS

[“SEC. 404. (a) The Administration shall provide financial assistance to each State applicant under this part to carry out the programs or projects submitted by such applicant upon determining that—

[“(1) the application or amendment thereof is consistent with the requirements of this title;

[“(2) the application or amendment thereof was made public prior to submission to the Administration and an opportunity to comment thereon was provided to citizens and neighborhood and community groups; and

[“(3) prior to the approval of the application or amendment thereof the Administration has made an affirmative finding in writing that the program or project is likely to contribute effectively to the achievement of the objectives of section 401 of this title.

Each application or amendment made and submitted for approval to the Administration pursuant to section 403 of this title shall be deemed approved, in whole or in part, by the Administration within ninety days after first received unless the Administration informs the applicant of specific reasons for disapproval.

“[(b) The Administration shall suspend funding for an approved application in whole or in part if such application contains a program or project which has failed to conform to the requirements or statutory objectives of this Act as evidenced by—

[“(1) the annual performance reports submitted to the Administration by the applicant pursuant to section 802(b) of this title;

[“(2) the failure of the applicant to submit annual performance reports pursuant to section 403 of this title;

[“(3) evaluations conducted pursuant to section 802(b);

[“(4) evaluations and other information provided by the National Institute of Justice.

The Administration may make appropriate adjustments in the amounts of grants in accordance with its findings pursuant to this subsection.

[“(c) Grant funds awarded under part D shall not be used for—

[“(1) the purchase of equipment of hardware except as provided in section 102(7), or the payment of personnel costs, unless the cost of such purchases or payments is incurred as an incidental and necessary part of a program of proven effectiveness, a program having a record of proven success, or a program offering high probability of improving the functioning of the criminal justice system (including bulletproof vests). In determining whether to apply this limitation, consideration must be given to the extent of prior funding from any sources in that jurisdiction for substantially similar activites;

[“(2) programs which have as their primary purpose general salary payments for employees or classes of employees within an eligible jurisdiction, except for the compensation of personnel for time engaged in conducting or undergoing training programs or the compensation of personnel engaged in research, development, demonstration, or short-term programs;

[“(3) construction projects; or

[“(4) programs or projects which, based upon evaluations by the National Institute of Justice, Law Enforcement Assistance Administration, Bureau of Justice Statistics, State or local agencies, and other public or private organizations, have been demonstrated to offer a low probability of improving the functioning of the criminal justice system. Such programs must be formally identified by a notice in the Federal Register after opportunity for comment.

[“(d) The Administration shall not finally disapprove any application submitted to the Administrator under this part, or any amendments thereof, without first affording the applicant reasonable notice and opportunity for a hearing and appeal pursuant to section 803 of this title.

[“ALLOCATION AND DISTRIBUTION OF FUNDS

[“SEC. 405. (a) Of the total amount appropriated for parts D, E, and F in any fiscal year, 80 per centum shall be set aside for part D and allocated to States, units of local government, and combinations of such units as follows:

[“(1) The sum of $300,000 to each of the participating States as defined in section 402(a)(1) and the balance according to one of the following two formulas, whichever formula results in the larger amount:

[“(A) Of the remaining amount to be allocated pursuant to this part:

[“(i) 25 per centum shall be allocated in proportion to the relative population within the State as compared to the population in all States;

[“(ii) 25 per centum shall be allocated in proportion to the relative number of index crimes (as documented by the Department of Justice) reported within the State as compared to such numbers in all States;

[“(iii) 25 per centum shall be allocated in proportion to the relative amount of total State and local criminal justice expenditures within the State as compared to such amounts in all States; and

[“(iv) 25 per centum shall be allocated in proportion to the relative population within the State, weighted by the share of State personal income paid in State and local taxes, as compared to such weighted populations in all States; or

[“(B) The remaining amount to be allocated pursuant to this part shall be allocated in proportion to the relative population within the State as compared to the population, in all States;

except that no State which receives financial assistance pursuant to subparagraph (A) shall receive an amount in excess of 110 per centum of that amount available to a State pursuant to subparagraph (B). Formula allocations under this section shall utilize relative population data only for the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

[“(2) If the fund allocation to each of the States pursuant to paragraph (1) results in a total amount in excess of the amount appropriated for the purposes of this part, additional funds shall be allocated by the Administration from part E or F to the States for purposes consistent with those parts so that the total amount equals the total amount allocated under paragraph (1). No State shall receive an allocation pursuant to paragraph (1) which is less than the block grant allocation received by such State for fiscal year 1979 pursuant to parts C and E, except that if the total amount appropriated for part D for any fiscal year subsequent to fiscal year 1979 is less than the total block grant appropriation for parts C and E during fiscal year 1979, the States shall receive an allocation in accordance with paragraph (1)(B).

[“(3) From the amount made available to each State pursuant to paragraphs (1) and (2), the Administration shall determine basic allocations to be made available to the State, to eligible jurisdictions as defined in section 402(a) (2), (3), or (4) and to eligible jurisdictions as defined in section 402(a)(5). Such allocations shall be determined—

[“(A) by distributing 70 per centum of available funds allocated under paragraphs (1) and (2) to the State and those eligible units of local government within the State as defined in section 402(a) in a proportion equal to their own respective share of total State and local criminal justice expenditures; and

[“(B) by dividing the remaining 30 per centum of available funds allocated under paragraphs (1) and (2) and distributing to the State and to those eligible units of local government within the State as defined in section 402(a), in four equal shares in amounts determined as follows:

[“(i) for combating crime as specified in section 401(a), a proportion of the available funds equal to their own respective share of total State and local expenditures for police services from all sources;

[“(ii) for improving court administration as specified in section 401(a), a proportion of the available funds equal to their own respective share of total State and local expenditures for judicial, legal, and prosecutive, and public defense services from all sources;

[“(iii) for improving correctional services as specified in section 401(a), a proportion of the available funds equal to their own respective share of total State and local expenditures for correctional services from all sources; and

[“(iv) for devising effective alternatives to the criminal justice system as specified in section 401(a) a proportion of the available funds equal to their own respective share of total State and local expenditures from all sources.

[“(4) All allocations under paragraph (3) shall be based upon the most accurate and complete data available for such fiscal year or for the most recent fiscal year for which accurate data are available. Eligible jurisdictions as defined in section 402(a)(4) may not receive an allocation based upon the population of eligible cities and counties as defined in section 402(a) (2), (3), and (5) unless such cities and counties participate in activities under this title as part of a combination of units of local government as defined in section 402(a)(4). In determining allocations for the eligible units as defined in section 402(a), an aggregate allocation may be utilized where eligible jurisdictions as defined in section 402(a) combine to meet the population requirements of section 402(a)(4).

[“(5) The amount made available pursuant to paragraph (3) to eligible units of local government within each State, as defined in section 402(a)(5), and to eligible jurisdictions, as defined in section 402(a) (2), (3), or (5) which choose not to combine pursuant to section 402(a)(4) and choose not to exercise the powers of section 402(c), shall be reserved and set aside in a special discretionary fund for use by the council pursuant to section 402 of this title, in making grants (in addition to any other grants which may be made under this title to the same entities or for the same purposes) to such units of local government or combinations thereof. The council shall allocate such funds among such local units of government or combinations thereof which make application pursuant to section 403 of this title, according to the criteria of this title and on the terms and conditions established by such council at its discretion. If in a particular State, there are no eligible units of local government, as defined in section 402(a) (2), (3), or (4), of this part, the amount otherwise reserved and set aside in the special discretionary fund shall consist of the entire amount made available to local units of government, pursuant to this section.

[“(b) At the request of the State legislature while in session or a body designated to act while the legislature is not in session, general goals, priorities, and policies of the council shall be submitted to the legislature for an advisory review prior to its implementation by the council. In this review the general criminal justice goals, priorities, and policies that have been developed pursuant to this part shall be considered. If the legislature or the interim body has not reviewed such matters forty-five days after receipt, such matters shall then be deemed reviewed.

[“(c) No award of funds that are allocated to the States, units of local government, or combinations thereof under this part shall be made with respect to a program other than a program contained in an approved application.

[“(d) If the Administration determines, on the basis of information available to it during any fiscal year, that a portion of the funds allocated to a State, unit of local government, or combination thereof for that fiscal year will not be required, or that the State, unit of local government, or combination thereof will be unable to qualify or receive funds under the requirements of this part, such funds shall be available for reallocation to the States, or other units of local government and combinations thereof within such State, as the Administration may determine in its discretion, but all States shall be considered equally for reallocated funds.

[“(e) A State may award funds from the State allocation to private nonprofit organizations. Eligible jurisdictions as defined in section 402(a) (2) through (5) may utilize the services of private nonprofit organizations for purposes consistent with this title.

[“(f) In order to receive formula grants under the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, a State shall submit a plan for carrying out the purposes of that Act in accordance with the provisions of this title and section 223 of that Act. Such plan may at the direction of the Administrator be incorporated into the State application to be submitted under this part.

[“(e) Eligible jurisdictions which choose to utilize regional planning units may utilize the boundaries and organization of existing general purpose regional planning bodies within the State.

[“PART E—NATIONAL PRIORITY GRANTS

[“PURPOSE

[“SEC. 501. It is the purpose of this part, through the provision of additional Federal financial aid and assistance, to encourage States and units of local government to carry out programs which, on the basis of research, demonstration, or evaluations by the National Institute of Justice, Bureau of Justice Statistics, Law Enforcement Assistance Administration, State or local governments, or other Federal, State, local, or private organizations or agencies, have been shown to meet the criteria of section 503(a).

[“PERCENTAGE OF APPROPRIATION FOR NATIONAL PRIORITY GRANT PROGRAM

[“SEC. 502. Of the total amount appropriated for parts D, E, and F, in any fiscal year, 10 per centum shall be reserved and set aside pursuant to this part as funding incentives for use by the Administration in making national priority grants (in addition to any other grants which may be made under this title to the same entities or for the same purpose) to States, units of local government, and combinations of such units.

[“PROCEDURE FOR DESIGNATING NATIONAL PRIORITY PROGRAMS

[“SEC. 503. (a) The Director of the Office of Justice Assistance, Research, and Statistics and the Administrator of the Law Enforcement Assistance Administration shall periodically and jointly designate national priority programs and projects which through research, demonstration, or evaluation have been shown to be effective or innovative and to have a likely beneficial impact on criminal justice. Such national priorities may include programs and projects designated to improve the comprehensive planning and coordination of State and local criminal justice activities. Priorities established under this subsection shall be considered priorities for a period of time determined by such Director and Administrator jointly but not to exceed three years from the time of such determination except in cases of recipients for which State or local budgetary restraints prevent assumption of costs of priority projects. Such priorities shall be designated according to such criteria, and on such terms and conditions, as such Director and such Administrator jointly may determine.

[“(b) Such Director and such Administrator shall jointly annually request the National Institute of Justice, the Bureau of Justice Statistics, the Law Enforcement Assistance Administration, State and local governments, and other appropriate public and private agencies to suggest national priority programs and projects. Such Director and such Administrator shall jointly then, pursuant to regulations such Director and such Administrator jointly promulgate annually, publish proposed national priority programs and projects pursuant to this part and invite and encourage public comment concerning such priorities. Such priority programs and projects shall not be established or modified until such Director and such Administrator jointly have provided at least sixty days advance notice for public comment and shall encourage and invite recommendations and opinion concerning such priorities from appropriate agencies and officials of State and units of local government. After considering any comments submitted during such period of time, such Director and such Administrator jointly shall establish priority programs and projects for that year (and determine whether existing priority programs and projects should be modified). Such Director and such Administrator shall jointly publish in the Federal Register the priority programs and projects established pursuant to this part prior to the beginning of fiscal year 1981 and each fiscal year thereafter for which appropriations will be available to carry out the program. In the event of a disagreement by such Director and such Administrator as to the exercise of joint functions under this section, the Attorney General shall resolve such disagreement.

[“APPLICATION REQUIREMENTS

[“SEC. 504. (a) No grant may be made pursuant to this part unless an application has been submitted to the Administration in which the applicant—

[“(1) identifies the priority program to be funded and describes how funds allocated pursuant to this part and pursuant to part D will be expended to carry out the priority program;

[“(2) describes specifically what percentages of funds allocated for the upcoming year pursuant to part D will be spent on priority programs and projects pursuant to this part;

[“(3) describes specifically the priority programs and projects for which funds are to be allocated pursuant to part D for the upcoming fiscal year;

[“(4) describes what percentage of part D funds were expended on national priority projects during the preceding fiscal year; and

[“(5) describes specifically the priority programs and projects for which funds were allocated pursuant to part D during the preceding fiscal year and the amount of such allocation.

[“(b) Each applicant for funds under this part shall certify that its program or project meets all the requirements of this section, that all the information contained in the application is correct, and that the applicant will comply with all the provisions of this title and all other applicable Federal laws. Such certification shall be made in a form acceptable to the Administration.

[“(c) Each application must be submitted for review to the criminal justice council in whose State the applicant is located. The council shall have thirty days to comment to the Administration upon the application. Any recommendation shall be accompanied by supporting rationale.

[“(d) States and units of local government may utilize the services of private nonprofit organizations for purposes consistent with this part.

[“CRITERIA FOR AWARD

[“SEC. 505. (a) The Administration shall, after appropriate consultation with representatives of State and local governments and representatives of the various components of the justice system at all levels of government, establish reasonable requirements consistent with this part for the award of national priority grants. Procedures for awards of national priority grants shall be published in the Federal Register and no national priority grant shall be made in a manner inconsistent with these procedures. The Administration in determining whether to award a priority grant to an eligible jurisdiction shall give consideration to the criminal justice needs and efforts of eligible jurisdictions, to the need for continuing programs which would not otherwise be continued because of the lack of adequate part D funds, and to the degree to which an eligible jurisdiction has expended or proposes to expend funds from part D or other sources of funds, including other Federal grants, for priority programs and projects. No jurisdiction shall be denied a priority grant solely on the basis of its population.

[“(b) Grants under this part may be made in an amount equal to 50 per centum of the cost of the priority program or project for which such grant is made except allocations made pursuant to section 405(a)(2), which may be made in an amount equal to 100 per centum of the cost of the funded program. The remaining costs may be provided from part D funds or from any other source of funds, including other Federal grants, available to the eligible jurisdiction. The Administration may provide technical assistance to any priority program or project funded under this part. Technical assistance so provided may be funded in an amount equal to 100 per centum of its cost from funds set aside pursuant to this part.

[“(c) Amounts reserved and set aside pursuant to this part in any fiscal year, but not used in such year, may be used by the Administration to provide additional financial assistance to priority programs or projects of demonstrated effectiveness in improving the functioning of the criminal justice system notwithstanding the provisions of subsection (b).

[“(d) The Administration may provide financial aid and assistance to programs or projects under this part for a period not to exceed three years. Grants made pursuant to this part may be extended or renewed by the Administration for an additional period of up to two years if an evaluation of the program or project indicates that it has been effective in achieving the stated goals or offers the potential for improving the functioning of the criminal justice system. A recipient shall assume the cost of any program assisted under this part after the period of Federal assistance unless the Administrator determines that the recipient is unable to assume such cost because of State or local budgetary restraints. The Administration shall assure that the problems and needs of all of the States are taken into account in distributing funds under this part among the States.

[“PART F—DISCRETIONARY GRANTS

[“PURPOSE

[“SEC. 601. It is the purpose of this part, through the provision of additional Federal financial assistance, to encourage States, units of local government, combinations of such units, or private nonprofit organizations to—

[“(1) undertake programs and projects, including educational programs, to improve and strengthen the criminal justice system;

[“(2) improve the comprehensive planning and coordination of State and local criminal justice activities especially coordination between city and county jurisdictions;

[“(3) provide for the equitable distribution of funds under this title among all segments and components of the criminal justice system;

[“(4) develop and implement programs and projects to redirect resources so as to improve and expand the capacity of States and units of local government and combinations of such units, to detect, investigate, prosecute, and otherwise combat and prevent white-collar crime and public corruption, to improve and expand cooperation among the Federal Government, States, and units of local government in order to enhance the overall criminal justice system response to white-collar crime and public corruption, and to foster the creation and implementation of a comprehensive national strategy to prevent and combat white-collar crime and public corruption;

[“(5) to support modernization and improvement of State and local court and corrections systems and programs;

[“(6) to support organized crime programs, programs to prevent and reduce crime in public or private places and programs which are designed to disrupt illicit commerce in stolen goods and property; and

[“(7) to support community and neighborhood anticrime efforts.

[“PERCENTAGE OF APPROPRIATION FOR DISCRETIONARY GRANT PROGRAM

[“SEC. 602. Of the total amount appropriated for parts D, E, and F in any fiscal year 10 per centum shall be reserved and set aside pursuant to this part in a special discretionary fund for use by the Administration in making grants (in addition to any other grants which may be made under this title to the same entities or for the same purposes) to States, units of local government, combinations of such units, or private nonprofit organizations, for the purposes set forth in section 601 of this title. The Administrator shall assure that funds allocated under this subsection to private nonprofit organizations shall be used for the purpose of developing and conducting programs and projects which would not otherwise be undertaken pursuant to this title including programs and projects—

[“(1) to stimulate and encourage the improvement of justice and the modernization of State court operations by means of financial assistance to national nonprofit organizations operating in conjunction with and serving the judicial branches of State governments;

[“(2) to provide national education and training programs for State and local prosecutors, defense personnel, judges and judicial personnel, and to disseminate and demonstrate new legal developments and methods by means of teaching, special projects, practice, and the publication of manuals and materials to improve the administration of criminal justice. Organizations supported under this paragraph shall assist State and local agencies in the education and training of personnel on a State and regional basis;

[“(3) to support community and neighborhood anticrime programs;

[“(4) to stimulate, improve, and support victim-witness assistance programs; and

[“(5) to improve the administration of justice by encouraging and supporting the development, dissemination, implementation, evaluation, and revision of criminal justice standards and guidelines.

[“PROCEDURE FOR ESTABLISHING DISCRETIONARY PROGRAMS

[“SEC. 603. (a) The Director of the Office of Justice Assistance, Research, and Statistics and the Administrator of the Law Enforcement Assistance Administration shall periodically and jointly establish discretionary programs and projects for financial assistance under this part. Such programs and projects shall be considered priorities for a period of time not to exceed three years from the time of such determination.

“(b) Such Director and such Administrator shall jointly annually request the national Institute of Justice, the Bureau of Justice Statistics, the Law Enforcement Assistance Administration, State and local governments, and other appropriate public and private agencies to suggest discretionary programs and projects. Such Director and such Administrator shall jointly then, pursuant to regulations, annually publish the proposed priorities pursuant to this part and invite and encourage public comment concerning such priorities. Priorities shall not be established or modified until such Director and such Administrator jointly have provided at least sixty-days advance notice for such public comment and such Director and such Administrator jointly shall encourage and invite recommendations and opinion concerning such priorities from appropriate agencies and officials of State and units of local government. After considering any comments submitted during such period of time and after consultation with appropriate agencies and officials of State and units of local government, such Director and such Administrator jointly shall determine whether existing established priorities should be modified. Such Director and such Administrator shall jointly publish in the Federal Register the priorities established pursuant to this part prior to the beginning of fiscal year 1981 and each fiscal year thereafter for which appropriations will be available to carry out the program.

[“APPLICATION REQUIREMENTS

[“SEC. 604. (a) No grant may be made pursuant to this part unless an application has been submitted to the Administration in which the applicant—

[“(1) sets forth a program or project which is eligible for funding pursuant to this part;

[“(2) describes the services to be provided, performance goals and the manner in which the program is to be carried out;

[“(3) describes the method to be used to evaluate the program or project in order to determine its impact and effectiveness in achieving the stated goals and agrees to conduct such evaluation according to the procedures and terms established by the Administration;

[“(4) indicates, if it is a private nonprofit organization, that is has consulted with appropriate agencies and officials of the State and units of local government to be affected by the program and project.

[“(b) Each applicant for funds under this part shall certify that its program or project meets all the requirements of this section, that all the information contained in the application is correct, and that the applicant will comply with all the provisions of this title and all other applicable Federal laws. Such certification shall be made in a form acceptable to the Administration.

[“CRITERIA FOR AWARD

[“SEC. 605. The Administration shall, in its discretion and according to the criteria and on the terms and conditions it determines consistent with this part, provide financial assistance to those programs or projects which most clearly satisfy the priorities established under section 603. In providing such assistance pursuant to this part, the Administration shall consider whether certain segments and components of the criminal justice system have received a disproportionate allocation of financial aid and assistance pursuant to other parts of this title, and, if such a finding is made, shall assure the funding of such other segments and components of the criminal justice system as to correct inequities resulting from such disproportionate allocations. Federal funding under this part may be up to 100 per centum of the cost of the program. In distributing funds under this part among the States, the Administration shall assure that the problems and needs of all of the States are taken into account and shall fund some programs and projects responsive to each type of section 402 eligible jurisdiction.

[“PERIOD FOR AWARD

[“SEC. 606. The Administration may provide financial aid and assistance to programs or projects under this part for a period not to exceed three years. Grants made pursuant to this part may be extended or renewed by the Administration for an additional period of up to two years if—

[“(1) an evaluation of the program or project indicates that it has been effective in achieving the stated goals or offers the potential for improving the functioning of the criminal justice system; and

[“(2) the State, unit of local government, or combination thereof and private nonprofit organizations within which the program or project has been conducted agrees to provide at least one-half of the total cost of such program or project from part D funds or from any other source of funds, including other Federal grants, available to the eligible jurisdiction. Funding for the management and the administration of national nonproft organizations under section 602(1) of this part is not subject to the funding limitations of this section.

[“Part G—Training and Manpower Development

[“PURPOSE

[“Sec. 701. It is the purpose of this part to provide for and encourage training, manpower development, and personnel practices for the purpose of improving the criminal justice system.

[“TRAINING FOR PROSECUTING ATTORNEYS

[“Sec. 702. (a) The Administration is authorized to establish and support a training program for prosecuting attorneys from State and local agencies engaged in the prosecution of white-collar and organized crime. The program shall be designed to develop new or improved approaches, techniques, systems, manuals, and devices to strengthen prosecutive capabilities against white-collar and organized crime.

[“(b) While participating in the training program or traveling in connection with participation in the training program, State and local personnel may be allowed travel expenses and a per diem allowance in the same manner as prescribed under section 5703 of title 5, United States Code, for persons employed intermittently in the Government service.

[“(c) The cost of training State and local personnel under this section shall be provided out of funds appropriated to the Administration for the purpose of such training.

[“TRAINING STATE AND LOCAL CRIMINAL JUSTICE PERSONNEL

[“Sec. 703. (a) The Administration is authorized—

[“(1) to assist in conducting local, regional, or national training programs for the training of State and local criminal justice personnel, including but not limited to those engaged in the investigation of crime and apprehension of criminals, community relations, the prosecution, defense, or adjudication of those charged with crime, corrections, rehabilitation, probation, and parole of offenders. Such training activities shall be designed to supplement and improve rather than supplant the training activities of the State and units of local government and shall not duplicate the training activities of the Federal Bureau of Investigation. While participating in the training program or traveling in connection with participation in the training program, State and local personnel may be allowed travel expenses and a per diem allowance in the same manner as prescribed under section 5703 of title 5, United States Code, for persons employed intermittently in the Government service;

[“(2) to carry out a progam of planning, development, demonstration, and evaluation of training programs for State and local criminal justice personnel;

[“(3) to assist in conducting programs relating to recruitment, selection, placement, and career development practices of State and local law enforcement and criminal justice personnel, and to assist State and local governments in planning manpower programs for criminal justice; and

[“(4) to carry out a program of planning, development, demonstration, and evaluation of recruitment, selection, and placement practices.

[“(b)(1) The amount of a grant or contract under this section may be up to 100 per centum of the total cost of a program, but the total financial support may not exceed 80 per centum of the total operating budget of any funded institutions or programs.

[“(2) Institutions funded under this section shall assure that to the maximum extent feasible efforts shall be made to increase the non-Federal share of the total operating budgets of such institutions or programs with the objective of becoming self-sustaining.

[“(3) To the greatest extent possible funds appropriated for the purposes of this section shall not be utilized to provide per diem or subsistence for State and local officials receiving such training.

[“FBI TRAINING OF STATE AND LOCAL CRIMINAL JUSTICE PERSONNEL

[“SEC. 704. (a) The Director of the Federal Bureau of Investigation is authorized to—

[“(1) establish and conduct training programs at the Federal Bureau of Investigation National Academy at Quantico, Virginia, to provide, at the request of a State or unit of local government, training for State and local criminal justice personnel;

[“(2) develop new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen criminal justice; and

[“(3) assist in conducting, at the request of a State or unit of local government, local and regional training programs for the training of State and local criminal justice personnel engaged in the investigation of crime and the apprehension of criminals. Such training shall be provided only for persons actually employed as State police or highway patrol, police of a unit of local government, sheriffs, and their deputies, and other persons as the State or unit may nominate for police training while such persons are actually employed as officers of such State or unit.

[“(b) In the exercise of the functions, powers, and duties established under this section the Director of the Federal Bureau of Investigation shall be under the general authority of the Attorney General.

[“CRIMINAL JUSTICE EDUCATION PROGRAM

[“SEC. 705. (a) Pursuant to the provisions of subsections (b) and (c), the Administration is authorized, after appropriate consultation with the Commissioner of Education, to carry out programs of academic educational assistance to improve and strengthen criminal justice.

[“(b) The Administration is authorized to enter into contracts to make, and make payments to institutions of higher education for loans, not exceeding $2,200 per academic year to any person, to persons enrolled on a full-time basis in undergraduate or graduate programs approved by the Administration and leading to degrees or certificates in areas directly related to criminal justice or suitable for persons employed in criminal justice, with special consideration to police or correctional personnel of States or units of local government on academic leave to earn such degrees or certificates. Loans to persons assisted under this subsection shall be made on such terms and conditions as the Administration and the institution offering such programs may determine, except that the total amount of any such loan, plus interest, shall be canceled for service as a full-time officer or employee of a criminal justice agency at the rate of 25 per centum of the total amount of such loan plus interest for each complete year of such service or its equivalent of such service, as determined under regulations of the Administration.

[“(c) The Administration is authorized to enter into contracts to make and to make payments to institutions of higher education for tuition, books, and fees, not exceeding $250 per academic quarter or $400 per semester for any person, for officers of any publicly funded criminal justice agency enrolled on a full-time or part-time basis in courses included in an undergraduate or graduate program which is approved by the Administration and which leads to a degree or certificate in an area related to criminal justice or an area suitable for persons employed in criminal justice. Assistance under this subsection may be granted only on behalf of an applicant who enters into an agreement to remain in the service of a criminal justice agency employing such applicant for a period of two years following completion of any course for which payments are provided under this subsection, and in the event such service is not completed, to repay the full amount of such payments on such terms and in such manner as the Administration may prescribe.

[“(d) Full-time teachers or persons preparing for careers as full-time teachers of courses related to criminal justice or suitable for persons employed in criminal justice, in institutions of higher education which are eligible to receive funds under this section, shall be eligible to receive assistance under subsections (b) and (c) as determined under regulations of the Administration.

[“(e) The Administration is authorized to make grants to or enter into contracts with institutions of higher education, or combinations of such institutions, to assist them in planning, developing, strengthening, improving, or carrying out programs or projects for the development or demonstration of improved methods of criminal justice education, including—

[“(1) planning for the development or expansion of undergraduate or graduate programs in law enforcement and criminal justice, and for law enforcement related courses in public schools;

[“(2) education and training of faculty members;

[“(3) strengthening the criminal justice aspects of courses leading to an undergraduate, graduate, or professional degree; and

[“(4) research into, and development of, methods of educating students or faculty, including the preparation of teaching materials and the planning of curriculums. The amount of a grant or contract may be up to 75 per centum of the total cost of programs and projects for which a grant or contract is made.

[“(f) The Administration is authorized to enter into contracts to make and to make payments to institutions of higher education for grants not exceeding $65 per week to persons enrolled on a full-time basis in undergraduate or graduate degree programs who are accepted for and serve in full-time internships in criminal justice agencies for not less than eight weeks during any summer recess or for any entire quarter or semester on leave from the degree program.

[“PART H—ADMINISTRATIVE PROVISIONS

[“ESTABLISHMENT OF OFFICE OF JUSTICE ASSISTANCE, RESEARCH, AND STATISTICS

[“SEC. 801. (a) There is established within the Department of Justice, under the general authority and policy control of the Attorney General, an Office of Justice Assistance, Research, and Statistics. The chief officer of the Office of Justice Assistance, Research, and Statistics shall be a Director appointed by the President by and with the advice and consent of the Senate.

[“(b) The Office of Justice Assistance, Research, and Statistics shall directly provide staff support to, and coordinate the activities of, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration.

[“CONSULTATION; ESTABLISHMENT OF RULES AND REGULATIONS

[“SEC. 802. (a) The Office of Justice Assistance, Research, and Statistics, the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, and the National Institute of Justice are authorized, after appropriate consultation with representatives of States and units of local government, to establish such rules, regulations, and procedures as are necessary to the exercise of their functions, and as are consistent with the stated purpose of this title.

[“(b) The Law Enforcement Assistance Administration shall, after consultation with the National Institute of Justice, the Bureau of Justice Statistics, State and local governments, and the appropriate public and private agencies, establish such rules and regulations as are necessary to assure the continuing evaluation of selected programs or projects conducted pursuant to parts D, E, and F, in order to determine—

[“(1) whether such programs or projects have achieved the performance goals stated in the original application, are of proven effectiveness, have a record of proven success, or offer a high probability of improving the criminal justice system;

[“(2) whether such programs or projects have contributed or are likely to contribute to the improvement of the criminal justice system and the reduction and prevention of crime;

[“(3) their cost in relation to their effectiveness in achieving stated goals;

[“(4) their impact on communities and participants; and

[“(5) their implication for related programs.

Evaluations shall be in addition to the requirements of sections 403 and 404. In conducting the evaluations called for by this subsection, the Law Enforcement Assistance Administration shall, when practical, compare the effectiveness of programs conducted by similar applicants and different applicants, and shall compare the effectiveness of programs or projects conducted by States and units of local government pursuant to part D of this title with similar programs carried out pursuant to parts E and F. The law Enforcement Assistance Administration shall also require applicants under part D to submit an annual performance report concerning activities carried out pursuant to part D together with an assessment by the applicant of the effectiveness of those activities in achieving the objectives of section 401 of this title and the relationships of those activities to the needs and objectives specified by the applicant in the application submitted pursuant to section 403 of this title. The administration shall suspend funding for an approved application under part D if an applicant fails to submit such an annual performance report.

[“(c) The procedures established to implement the provisions of this title shall minimize paperwork and prevent needless duplication and unnecessary delays in award and expenditure of funds at all levels of government.

[“NOTICE AND HEARING ON DENIAL OR TERMINATION OF GRANT

[“SEC. 803. (a) Whenever, after reasonable notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code, and National Institute of Justice, the Bureau of Justice Statistics, or the Law Enforcement Assistance Administration finds that a recipient of their respective assistance under this title has failed to comply substantially with—

[“(1) any provision of this title;

[“(2) any regulations or guidelines promulgated under this title; or

[“(3) any application submitted in accordance with the provisions of this title, or the provisions of any other applicable Federal Act;

they, until satisfied that there is no longer any such failure to comply, shall—

[“(A) terminate payments to the recipient under this title;

[“(B) reduce payments to the recipient under this title by an amount equal to the amount of such payments which were not expended in accordance with this title; or

["(C) limit the availability of payments under this title to programs, projects, or activities not affected by such failure to comply.

["(b) If a State grant application filed under part D or any grant application filed under any other part of this title has been rejected or a State applicant under part D or an applicant under any other part of this title has been denied a grant or has had a grant, or any portion of a grant, discontinued, terminated or has been given a grant in a lesser amount that such applicant believes appropriate under the provisions of this title, the National Institute of Justice, the Bureau of Justice Statistics, or the Law Enforcement Assistance Administration, as appropriate, shall notify the applicant or grantee of its action and set forth the reason for the action taken. Whenever such an applicant or grantee requests a hearing, the National Institute of Justice, the Bureau of Justice Statistics, the Law Enforcement Assistance Administration, or any authorized officer thereof, is authorized and directed to hold such hearings or investigations, including hearings on the record in accordacne with section 554 of title 5, United States Code, at such times and places as necessary, following appropriate and adequate notice to such applicant; and the findings of fact and determinations made with respect thereto shall be final and conclusive, except as otherwise provided herein.

["(c) If such recipient is dissatisfied with the findings and determinations of the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, or the National Institute of Justice, following notice and hearing provided for in subsection (a), a request may be made for rehearing, under such regulations and procedures as such Administration, Bureau, or Institute, as the case may be, may establish, and such recipient shall be afforded an opportunity to present such additional information as may be deemed appropriate and pertinent to the matter involved.

["FINALITY OF DETERMINATIONS

["SEC. 804 In carrying out the functions vested by this title in the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, or the National Institute of Justice, their determinations, findings, and conclusions shall, after reasonable notice and opportunity for a hearing, be final and conclusive upon all applications, except as otherwise provided herein.

["APPELLATE COURT REVIEW

["SEC. 805. (a) If any applicant or recipient is dissatisfied with a final action with respect to section 803, 804, or 815(c)(2)(G) of this part, such applicant or recipient may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such applicant or recipient is located, or in the United States Court of Appeals for the District of Columbia, a petition for review of the action. A copy of the petition shall forthwith be transmitted by the petitioner to the Office of Justice Assistance, Research, and Statistics, the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, or the National Institute of Justice, as appropriate, and the Attorney General of the United States, who shall represent the Federal Government in the litigation. The Office of Justice Assistance, Research, and Statistics, the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, or the National Institute of Justice, as appropriate, shall thereupon file in the court the record of the proceeding on which the action was based, as provided in section 2112 of title 28, United States Code. No objection to the action shall be considered by the court unless such objection has been urged before the Office of Justice Assistance, Research, and Statistics, the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, or the National Institute of Justice, as appropriate.

[“(b) The court shall have jurisdiction to affirm or modify a final action or to set it aside in whole or in part. The findings of fact by the Office of Justice Assistance, Research, and Statistics, the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, or the National Institute of Justice, if supported by substantial evidence on the record considered as a whole, shall be conclusive, but the court, for good cause shown, may remand the case to the Office of Justice Assistance, Research, and Statistics, the Law Enforcement Assistance Administration, the National Institute of Justice, or the Bureau of Justice Statistics, to take additional evidence to be made part of the record. The Office of Justice Assistance, Research, and Statistics, the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, or the National Institute of Justice, may thereupon make new or modified findings of fact by reason of the new evidence so taken and filed with the court and shall file such modified or new findings along with any recommendations such entity may have for the modification or setting aside of such entity’s original action. All new or modified findings shall be conclusive with respect to questions of fact if supported by substantial evidence when the record as a whole is considered.

[“(c) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Office of Justice Assistance, Research, and Statistics, the Law Enforcement Assistance Administration, the Bureau of Justice Statistics, or the National Institute of Justice, or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certifications as provided in section 1254 of title 28, United States Code.

[“DELEGATION OF FUNCTIONS

[“SEC. 806. The Attorney General, the Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration may delegate to any of their respective officers or employees such functions as they deem appropriate.

[“SUBPENA POWER; AUTHORITY TO HOLD HEARINGS

[“SEC. 807. In carrying out their functions, the Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration, and upon authorization, any member thereof or any hearing examiner or administrative law judge assigned to or employed thereby shall have the power to hold hearings and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States they may designate.

[“COMPENSATION OF DIRECTOR OF OFFICE OF JUSTICE ASSISTANCE, RESEARCH, AND STATISTICS

[“SEC. 808. Section 5314 of title 5, United States Code, is amended—

[“(1) by adding at the end thereof—

[“ ‘Director, Office of Justice Assistance, Research, and Statistics.’ and

[“(2) by striking out—

[“ ‘Administrator of Law Enforcement Assistance.’.

[“COMPENSATION OF OTHER FEDERAL OFFICERS

[“SEC. 809. Section 5315 of title 5, United States Code, is amended—

[“(1) by striking out—

[“ ‘Deputy Administrator for Policy Development of the Law Enforcement Assistance Administration.’ and

[“ ‘Deputy Administrator for Administration of the Law Enforcement Assistance Administration.’; and

[“(2) by adding at the end the following:

[“ ‘Administrator of Law Enforcement Assistance.

[“ ‘Director of the National Institute of Justice.

[“ ‘Director of the Bureau of Justice Statistics.’.

[“EMPLOYMENT OF HEARING OFFICERS

[“SEC. 810. The Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration may appoint such officers and employees as shall be necessary to carry out their powers and duties under this title and may appoint such hearing examiners or administrative law judges or request the use of such administrative law judges selected by the Office of Personnel Management pursuant to section 3344 of title 5, United States Code, as shall be necessary to carry out their powers and duties under this title.

[“AUTHORITY TO USE AVAILABLE SERVICES

[“SEC. 811. The Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration are authorized on a reimbursable basis when appropriate, to use the available services, equipment, personnel, and facilities of Federal, State, and local agencies to the extent deemed appropriate after giving due consideration to the effectiveness of such existing services, equipment, personnel, and facilities.

[“CONSULTATION WITH OTHER FEDERAL, STATE, AND LOCAL OFFICIALS

[“SEC. 812. In carrying out the provisions of this title, including the issuance of regulations, the Attorney General, the Director of the Office of Justice Assistance, Research, and Statistics, the Administrator of the Law Enforcement Assistance Administration, and the Directors of the National Institute of Justice and the Bureau of Justice Statistics shall consult with other Federal departments and agencies and State and local officials.

[“REIMBURSEMENT AUTHORITY

[“SEC. 813. (a) The Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration may arrange with and reimburse the heads of other Federal departments and agencies for the performance of any of their functions under this title.

[“(b) The National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration, and the Office of Justice Assistance, Research, and Statistics in carrying out their respective functions may use grants, contracts, or cooperative agreements in accordance with the standards established in the Federal Grant and Cooperative Agreement Act of 1977 (41 U.S.C. 501 et seq.).

[“SERVICES OF EXPERTS AND CONSULTANTS; ADVISORY COMMITTEES

[“SEC. 814. (a) The Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration may procure the services of experts and consultants in accordance with section 3109 of title 5, United States Code, at rates of compensation for individuals not to exceed the daily equivalent of the rate then payable for GS–18 by section 5332 of title 5, United States Code.

[“(b) The Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration are authorized to appoint, without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service, technical or other advisory committees to advise them with respect to the administration of this title as they deem necessary. Members of those committees not otherwise in the employ of the United States, while engaged in advising them or attending meetings of the committees, shall be compensated at rates to be fixed by the Offices but not to exceed the daily equivalent of the rate then payable for GS–18 by section 5332 of title 5, United States Code and while away from home or regular place of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of such title 5 for persons in the Government service employed intermittently.

[“(c) Payments under this title may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administration, and may be used to pay the transportation and subsistence expenses of persons attending conferences or other assemblages notwithstanding the provisions of the joint resolution entitled 'Joint resolution to prohibit expenditure of any moneys for housing, feeding, or transporting conventions or meetings', approved February 2, 1935 (31 U.S.C. 551).

[“PROHIBITION OF FEDERAL CONTROL OVER STATE AND LOCAL CRIMINAL JUSTICE AGENCIES

[“SEC. 815. (a) Nothing contained in this title or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof.

[“(b) Notwithstanding any other provision of law, nothing contained in this title shall be construed to authorize the National Institute of Justice, the Bureau of Justice Statistics, or the Law Enforcement Assistance Administration—

[“(1) to require, or condition the availability or amount of a grant upon the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance in any criminal justice agency; or

[“(2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

[“(c)(1) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title.

[“(2)(A) Whenever there has been—

[“(i) receipt of notice of a finding, after notice and opportunity for a hearing, by a Federal court (other than in an action brought by the Attorney General) or State court, or by a Federal or State administrative agency, to the effect that there has been a pattern or practice of discrimination in violation of paragraph (1); or

[“(ii) a determination after an investigation by the Office of Justice Assistance, Research, and Statistics (prior to a hearing under subparagraph (F) but including an opportunity for the State government or unit of local government to make a documentary submission regarding the allegation of discrimination with respect to such program or activity, with funds made available under this title) that a State government or unit of local government is not in compliance with paragraph (1);

the Office of Justice Assistance, Research, and Statistics shall, within ten days after such occurrence, notify the chief executive of the affected State, or the State in which the affected unit of local government is located, and the chief executive of such unit of local government, that such program or activity has been so found or determined not to be in compliance with paragraph (1), and shall request each chief executive, notified under this subparagraph with respect to such violation, to secure compliance. For purposes of clause (i) a finding by a Federal or State administrative agency shall be deemed rendered after notice and opportunity for a hearing if it is rendered pursuant to procedures consistent with the provisions of subchapter II of chapter 5 of title 5, United States Code.

[“(B) In the event the chief executive secures compliance after notice pursuant to subparagraph (A), the terms and conditions with which the affected State government or unit of local government agrees to comply shall be set forth in writing and signed by the chief executive of the State, by the chief executive of such unit (in the event of a violation by a unit of local government), and by the Office of Justice Assistance, Research, and Statistics. On or prior to the effective date of the agreement, the Office of Justice Assistance, Research, and Statistics shall send a copy of the agreement to each complainant, if any, with respect to such violation. The chief executive of the State, or the chief executive of the unit (in the event of a violation by a unit of local government) shall file semiannual reports with the Office of Justice Assistance, Research, and Statistics detailing the steps taken to comply with the agreement. These reports shall cease to be filed upon the determination of the Office of Justice Assistance, Research, and Statistics that compliance has been secured, or upon the determination by a Federal or State court that such State government or local governmental unit is in compliance with this section. Within fifteen days of receipt of such reports, the Office of Justice Assistance, Research, and Statistics shall send a copy thereof to each such complainant.

[“(C) If, at the conclusion of ninety days after notification under subparagraph (A)—

[“(i) compliance has not been secured by the chief executive of that State or the chief executive of that unit of local government; and

[“(ii) an administrative law judge has not made a determination under subparagraph (F) that it is likely the State government or unit of local government will prevail on the merits; the Office of Justice Assistance, Research, and Statistics shall notify the Attorney General that compliance has not been secured and caused to have suspended further payment of any funds under this title to that program or activity. Such suspension shall be limited to the specific program or activity cited by the Office of Justice Assistance, Research, and Statistics in the notice under subparagraph (A). Such suspension shall be effective for a period of not more than one hundred and twenty days, or, if there is a hearing under subparagraph (G), not more than thirty days after the conclusion of such hearing, unless there has been an express finding by the Office of Justice Assistance, Research, and Statistics, after notice and opportunity for such a hearing, that the recipient is not in compliance with paragraph (1).

[“(D) Payment of the suspended funds shall resume only if—

[“(i) such State government or unit of local government enters into a compliance agreement approved by the Office of Justice Assistance, Research, and Statistics and the Attorney General in accordance with subparagraph (B);

[“(ii) such State government or unit of local government complies fully with the final order or judgment of a Federal or

State court, or by a Federal or State administrative agency if that order or judgment covers all the matters raised by the Office of Justice Assistance, Research, and Statistics in the notice pursuant to subparagraph (A), or is found to be in compliance with paragraph (1) by such court; or

[“(iii) after a hearing the Office of Justice Assistance, Research, and Statistics pursuant to subparagraph (F) finds that noncompliance has not been demonstrated.

[“(E) Whenever the Attorney General files a civil action alleging a pattern or practice of discriminatory conduct on the basis of race, color, religion, national origin, or sex in any program or activity of a State government or unit of local government which State government or unit of local government receives funds made available under this title, and the conduct allegedly violates the provisions of this section and neither party within forty-five days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law, the Office of Justice Assistance, Research, and Statistics shall cause to have suspended further payment of any funds under this title to that specific program or activity alleged by the Attorney General to be in violation of the provisions of this subsection until such time as the court orders resumption of payment.

[“(F) Prior to the suspension of funds under subparagraph (C), but within the ninety-day period after notification under subparagraph (C), the State government or unit of local government may request an expedited preliminary hearing on the record in accordance with section 554 of title 5, United States Code, in order to determine whether it is likely that the State government or unit of local government would, at a full hearing under subparagraph (G), prevail on the merits on the issue of the alleged noncompliance. A finding under this subparagraph by the administrative law judge in favor of the State government or unit of local government shall defer the suspension of funds under subparagraph (C) pending a finding of noncompliance at the conclusion of the hearing on the merits under subparagraph (G).

[“(G)(i) At any time after notification under subparagraph (A), but before the conclusion of the one-hundred-and-twenty-day period referred to in subparagraph (C), a State government or unit of local government may request a hearing on the record in accordance with section 554 of title 5, United States Code, which the Office of Justice Assistance, Research, and Statistics shall initiate within sixty days of such request.

[“(ii) Within thirty days after the conclusion of the hearing, or, in the absence of a hearing, at the conclusion of the one-hundred-and-twenty-day period referred to in subparagraph (C), the Office of Justice Assistance, Research, and Statistics shall make a finding of compliance or noncompliance. If the Office of Justice Assistance, Research, and Statistics makes a finding of noncompliance, the Office of Justice Assistance, Research, and Statistics shall notify the Attorney General in order that the Attorney General may institute a civil action under paragraph (3), cause to have terminated the payment of funds under this title, and, if appropriate, seek repayment of such funds.

[“(iii) If the Office of Justice Assistance, Research, and Statistics makes a finding of compliance, payment of the suspended funds shall resume as provided in subparagraph (D).

[“(H) Any State government or unit of local government aggrieved by a final determination of the Office of Justice Assistance, Research, and Statistics under subparagraph (G) may appeal such determination as provided in section 805 of this title.

[“(3) Whenever the Attorney General has reason to believe that a State government or unit of local government has engaged in or is engaging in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in an appropriate United States district court. Such court may grant as relief any temporary restraining order, preliminary or permanent injunction, or other order, as necessary or appropriate to insure the full enjoyment of the rights described in this section, including the suspension, termination, or repayment of such funds made available under this title as the court may deem appropriate, or placing any further such funds in escrow pending the outcome of the litigation.

[“(4)(A) Whenever A State government or unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this subsection, a civil action may be institued after exhaustion of administrative remedies by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction. Administrative remedies shall be deemed to be exhausted upon the expiration of sixty days after the date the administrative complaint was filed with the Office of Justice Assistance, Research, and Statistics or any other administrative enforcement agency, unless within such period there has been a determination by the Office of Justice Assistance, Research, and Statistics or the agency on the merits of the complaint, in which case such remedies shall be deemed exhausted at the time the determination becomes final.

[“(B) In any civil action brought by a private person to enforce compliance with any provision of this subsection, the court may grant to a prevailing plaintiff reasonable attorney fees, unless the court determines that the lawsuit is frivolous, vexatious, brought for harassment purposes, or brought principally for the purpose of gaining attorney fees.

[“(C) In any action instituted under this section to enforce compliance with paragraph (1), the Attorney General, or a specially designated assistant for or in the name of the United States, may intervene upon timely application if he certifies that the action is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.

[“REPORT TO PRESIDENT AND CONGRESS

[“SEC. 816. (a) On or before March 31 of each year, the Administrator of the Law Enforcement Assistance Administration shall report to the President and to the Committees on the Judiciary of the Senate and House of Representatives on activities pursuant to parts D, E, F, and G during the preceding fiscal year. Such report shall include—

[“(1) a description of the progress made in accomplishing the objectives of such parts;

[“(2) a description of the national priority programs and projects established pursuant to part E;

[“(3) the amounts obligated under parts D, E, and F for each of the components of the criminal justice system;

[“(4) the nature and number of jurisdictions which expended funds under part D on national priority programs or projects established pursuant to part E, and the percentage of part D funds expended by such jurisdictions on such porgrams or projects;

[“(5) a summary of the major innovative policies and programs for reducing and preventing crime recommended by the Administration during the preceding fiscal year in the course of providing technical and financial aid and assistance to State and local governments pursuant to this title;

[“(6) a description of the procedures used to audit, monitor, and evaluate programs or projects to insure that all recipients have complied with the title and that the information contained in the applications was correct;

[“(7) the number of part D applications or amendments approved by the Administration without recommending substantial changes;

[“(8) the number of part D applications or amendments in which the Administration recommended substantial changes, and the disposition of such programs or projects;

[“(9) the number of programs or projects under part D applications or amendments with respect to which a discontinuation, suspension, or termination of payments occurred together with the reasons for such discontinuation, suspension, or termination;

[“(10) the number of programs or projects under part D applications or amendments which were subsequently discontinued by the jurisdiction following the termination of funding under this title; and

[“(11) a description of equipment whose cost in the aggregate was $100,000 or more that was purchased in connection with each program or project assisted under part D, and the current use status of such equipment.

[“(b) Not later than three years after the date of enactment of the Justice System Improvement Act of 1979, the Administrator of the Law Enforcement Assistant Administration, after consultation with the Director of the National Institute of Justice, the Director of the Bureau of Statistics, and the Administrator of the Office of Juvenile Justice and Delinquency Prevention, with respect to the receipt and compilation of evaluations, statistics, and performance reports required by this title, shall submit to the Committees on the Judiciary of the Senate and the House of Representatives a report. The report shall set forth comprehensive statistics which, together with the Administrator's analysis and findings, shall indicate whether grants made to States or units of local government under parts D, E, and F have made a reasonably expected contribution toward—

["(1) improving and strengthening law enforcement agencies, as measured by arrest rates, incidence rates, victimization rates, the number of reported crimes, clearance rates, the number of patrol or investigative hours per uniformed officer, or any other appropriate objective measure;

["(2) improving the police utilization of community resources through support of joint police-community projects designed to prevent or control neighborhood crime;

["(3) disrupting illicit commerce in stolen goods and property;

["(4) combating arson;

["(5) developing investigations and prosecutions of white-collar crime, organized crime, public-corruption-related offenses, and fraud against the government;

["(6) reducing the time between arrest or indictment and disposition of trial;

["(7) increasing the use and development of alternatives to the prosecution of selected offenders;

["(8) increasing the development and use of alternatives to pretrial detention that assure return to court and a minimization of the risk of danger;

["(9) increasing the rate at which prosecutors obtain convictions against habitual, nonstatus offenders;

["(10) developing and implementing programs which provide assistance to victims and witnesses, including restitution by the offender, programs encouraging victim and witness participation in the criminal justice system, and programs designed to prevent retribution against or intimidation of witnesses by persons charged with or convicted of crimes;

["(11) providing competent defense counsel for indigent and eligible low-income persons accused of criminal offenses;

["(12) developing projects to identify and meet the needs of drug dependent offenders;

["(13) increasing the availability and use of alternatives to maximum-security confinement of convicted offenders who pose no threat to public safety;

["(14) reducing the rates of violence among inmates in places of detention and confinement;

["(15) improving conditions of detention and confinement in adult and juvenile correctional institutions, as measured by the number of such institutions administering programs meeting accepted standards.

["(16) training criminal justice personnel in programs meeting standards recognized by the Administrator;

["(17) revision and recodification by States and units of local government of criminal statutes, rules, and procedures and revision of statutes, rules, and regulations governing State and local criminal justice agencies; and

["(18) developing statistical and evaluative systems in States and units of local government which assist the measurement of indicators in each of the areas described in paragraphs (1) through (17).

Such report shall identify separately, to the maximum practicable extent, such contribution according to the parts of this title under which such grants are authorized and made.

[“(c) Not later than two hundred and seventy days after the date of enactment of the Justice System Improvement Act of 1979, the Administrator of the Law Enforcement Assistance Administration shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a plan for the collection, analysis, and evaluation of any data relevant to measure, as objectively as is practicable, progress in each of the areas described in subsection (b). In developing such plan, the Administrator of the Law Enforcement Assistance Administration shall consult with the Director of the National Institute of Justice, the Director of the Bureau of Justice Statistics, the Administrator of the Office of Juvenile Justice and Delinquency Prevention, and the Committees on the Judiciary of the Senate and the House of Representatives. After such consultation and at any time prior to the submission of such plan as required by this subsection, the Administrator may recommend to such committees reporting areas in addition to those described in subsection (b). Such plans shall include the Administrator's recommended definitions of the terms ‘comprehensive statistics’ and ‘reasonably expected contribution’ as used in subsection (b), which take into account the total amount of funds available for distribution to States and units of local government under parts D, E, and F, as compared to the total amount of funds available for expenditure by States and units of local government for criminal justice purposes. Such plan shall be used by the Administrator in preparing the report required by subsection (b).

[“(d) The report required by subsection (b) shall address whether a reasonably expected contribution has been attained in the areas described in subsection (b) and any area added by the Administrator under subsection (c).

[“(e) To the maximum extent feasible, the Administrator shall minimize duplication in data collection requirements imposed on grantee agencies by this section.

[“RECORDKEEPING REQUIREMENT

[“SEC. 817. (a) Each recipient of funds under this title shall keep such records as the Office of Justice Assistance, Research, and Statistics shall prescribe, including records which fully disclose the amount and disposition by such recipient of the funds, the total cost of the project or undertaking for which such funds are used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

[“(b) The Office of Justice Assistance, Research, and statistics or any of its duly authorized representatives, shall have access for purpose of audit and examination of any books, documents, papers, and records of the recipients of funds under this title which in the opinion of the Office of Justice Assistance, Research, and Statistics may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to under this title.

[“(c) The Comptroller General of the United States or any of his duly authorized representatives, shall, until the expiration of three years after the completion of the program or project with which the assistance is used, have access for the purpose of audit and examination to any books, documents, papers, and records of recipients of Federal funds under this title which in the opinion of the Comptroller General may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to under this title.

[“(d) Within one hundred and twenty days after the enactment of this subsection, the Office of Justice Assistance, Research, and Statistics shall review existing civil rights regulations and conform them to this title. Such regulations shall include—

[“(1) reasonable and specific time limits for the Office of Justice Assistance, Research, and Statistics to respond to the filing of a complaint by any person alleging that a State government or unit of local government is in violation of the provisions of section 815(c) of this title, including reasonable time limits for instituting an investigation, making an appropriate determination with respect to the allegations, and advising the complainant of the status of the complaint; and

[“(2) reasonable and specific time limits for the Office of Justice Assistance, Research, and Statistics to conduct independent audits and reviews of State governments and units of local government receiving funds pursuant to this title for compliance with the provisions of section 815(c) of this title.

[“(e) The provisions of this section shall apply to all recipients of assistance under this title, whether by direct grant, cooperative agreement, or contract under this title or by subgrant or subcontract from primary grantees or contractors under this title.

[“(f) There is hereby established within the Law Enforcement Assistance Administration a revolving fund for the purpose of supporting projects that will acquire stollen goods and property in an effort to disrupt illicit commerce in such goods and property. Notwithstanding any other provision of law, any income or royalties generated from such projects together with income generated from any sale or use of such goods or property, where such goods or property are not claimed by their lawful owner, shall be paid into the revolving fund. Where a party establishes a legal right to such goods or property, the Administrator of the fund may in his discretion assert a claim against the property or goods in the amount of Federal funds used to purchase such goods or property. Proceeds from such claims shall be paid into the revolving fund. The Administrator is authorized to make disbursements by appropriate means, including grants, from the fund for the purpose of this section.

[“CONFIDENTIALITY OF INFORMATION

[“SEC. 818. (a) Except as provided by Federal law other than this title, no officer or employee of the Federal Government, and no recipient of assistance under the provisions of this title shall use or reveal any research or statistical information furnished under this title by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this title. Such information and copies thereof shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings.

[“(b) All criminal history information collected, stored, or disseminated through support under this title shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Office of Justice Assistance, Research, and Statistics shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this title, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

[“(c) All criminal intelligence systems operating through support under this title shall collect, maintain, and disseminate criminal intelligence information in conformance with policy standards which are prescribed by the Office of Justice Assistance, Research, and Statistics and which are written to assure that the funding and operation of these systems furthers the purpose of this title and to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals.

[“(d) Any person violating the provisions of this section, or of any rule, regulation, or order issued thereunder, shall be fined not to exceed $10,000, in addition to any other penalty imposed by law.

[“AUTHORITY TO ACCEPT VOLUNTARY SERVICES

[“SEC. 819. The Office of Justice Assistance, Research, and Statistics, the National Institute of Justice, the Bureau of Justice Statistics, and the Law Enforcement Assistance Administration are authorized to accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)). Such individuals shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims.

[“ADMINISTRATION OF JUVENILE DELINQUENCY PROGRAMS

[“SEC. 820. (a) All programs concerned with juvenile delinquency and administered by the Administration shall be administered or subject to the policy direction of the office established by section 201(a) of the Juvenile Justice and Delinquency Prevention Act of 1974.

[“(b) The Director of the National Institute of Justice and the Director of the Bureau of Justice Statistics shall work closely with the Administrator of the Office of Juvenile Justice and Deliquency Prevention in developing and implementing programs in the juvenile justice and delinquency prevention field.

[“PROHIBITION ON LAND ACQUISITION

[“SEC. 821. No funds under this title shall be used for land acquisition.

[“PROHIBITION ON USE OF CIA SERVICES

[“SEC. 822. Notwithstanding any other provision of this title, no use will be made of services, facilities, or personnel of the Central Intelligence Agency.

[“INDIAN LIABILITY WAIVER

[“SEC. 823. Where a State does not have an adequate forum to enforce grant provisions imposing liability on Indian tribes, the Administration is authorized to waive State liability and may pursue such legal remedies as are necessary.

[“DISTRICT OF COLUMBIA MATCHING FUND SOURCE

[“SEC. 824. Funds appropriated by the Congress for the activities of any agency of the District of Columbia government or the United States Government performing law enforcement functions in and for the District of Columbia may be used to provide the non-Federal share of the cost of programs or projects funded under this title.

[“LIMITATION ON CIVIL JUSTICE MATTERS

[“SEC. 825. Authority of any entity established under this title shall extend to civil justice matters only to the extent that such civil justice matters bear directly and substantially upon criminal justice matters or are inextricably intertwined with criminal justice matters.

[“REIMBURSEMENT FOR UNUSED EQUIPMENT

[“SEC. 826. The Law Enforcement Assistance Administration may require a State council, a grantee, or other recipient of assistance under this title to reimburse the Administration for the federally assisted part of the cost of any equipment whose purchase was in connection with a program or project assisted by such Administration under this title and which cost in the aggregate $100,000, or more, if such equipment has not been placed in use one year after the date set at the time of purchase for the commencement of such use, or has not continued in use during its useful life. In lieu of requiring reimbursement under this section, such Administration may require that the State council, a grantee, or other recipient of assistance under this title take appropriate measures to put such equipment into use.

[“PRISON INDUSTRY ENHANCEMENT

[“SEC. 827. (a) Section 1761 of title 18, United States Code, is amended by adding thereto a new subsection (c) as follows—

[“ ‘(c) In addition to the exceptions set forth in subsection (b) of this section, this chapter shall also not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners participating in a program of not more than seven pilot projects designated by the Administrator of the Law Enforcement Assistance Administration and who—

[“ ‘(1) have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows:

[“ ‘(A) taxes (Federal, State, local);

[“ ‘(B) reasonable charges for room and board as determined by regulations which shall be issued by the Chief State correctional officer;

[“ ‘(C) allocations for support of family pursuant to State statute, court order, or agreement by the offender;

[“ ‘(D) contributions to any fund established by law to compensate the victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages;

[“ ‘(2) have not solely by their status as offenders, been deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment, such as workmen’s compensation. However, such convicts or prisoners shall not be qualified to receive any payments for unemployment compensation while incarcerated, notwithstanding any other provision of the law to the contrary;

[“ ‘(3) have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment.’.

[“ (b) The first section of the Act entitled ‘An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes’, approved June 30, 1936 (49 Stat. 2036; 41 U.S.C. 35), commonly known as the Walsh-Healey Act, is amended by adding to the end of subsection (d) thereof, before ‘: and’, the following: ‘, except that this section, or any other law or Executive order containing similar prohibitions against purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of section 1761(c) of title 18, United States Code’.

[“ (c) The provisions of this section creating exemptions to Federal restrictions on marketability of prison made goods shall not apply unless—

[“ (1) representatives of local union central bodies or similar labor union organizations have been consulted prior to the initiation of any project qualifying of any exemption created by this section; and

[" (2) such paid inmate employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services.

["PART I—DEFINITIONS

["DEFINITIONS

["SEC. 901. (a) As used in this title—

["(1) 'criminal justice' means activities pertaining to crime prevention, control, or reduction, or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control, or reduce crime or to apprehend criminals, including juveniles, activities of courts having criminal jurisdiction, and related agencies (including but not limited to prosecutorial and defender services, juvenile delinquency agencies and pretrial service or release agencies), activities of corrections, probation, or parole authorities and related agencies assisting in the rehabilitation, supervision, and care of criminal offenders, and programs relating to the prevention, control, or reduction of narcotic addiction and juvenile delinquency;

["(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands;

["(3) 'unit of local government' means any city, county, township, town, borough, parish, village, or other general purpose political subdivision of a State, an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior, or, for the purpose of assistance eligibility, any agency of the District of Columbia government or the United States Government performing law enforcement functions in and for the District of Columbia;

["(4) 'construction' means the erection, acquisition, or expansion of new or existing buildings or other physical facilities, and the acquisition or installation of initial equipment therefor, but does not include renovation, repairs, or remodeling;

["(5) 'combination' as applied to States or units of local government means any grouping or joining together of such States or units for the purpose of preparing, developing, or implementing a criminal justice program or project;

["(6) 'public agency' means any State, unit of local government, combination of such States or units, or any department, agency, or instrumentality of any of the foregoing;

["(7) 'correctional institution or facility' means any place for the confinement or rehabilitation of offenders or individuals charged with or convicted of criminal offenses;

["(8) 'comprehensive', with respect to an application, means that the application must be based on a total and integrated analysis of the criminal justice problems, and that goals, priorities, and standards for methods, organization, and operation performance must be established in the application;

[“(9) ‘criminal history information’ includes records and related data, contained in an automated or manual criminal justice informational system, compiled by law enforcement agencies for the purpose of identifying criminal offenders and alleged offenders and maintaining as to such persons records of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release;

[“(10) ‘evaluation’ means the administration and conduct of studies and analyses to determine the impact and value of a project or program in accomplishing the statutory objectives of this title;

[“(11) ‘neighborhood or community-based organizations’ means organizations which are representative of communities or significant segments of communities;

[“(12) ‘chief executive’ means the highest official of a State or local jurisdiction;

[“(13) ‘municipality’ means—

[“(A) any unit of local government which is classified as a municipality by the United States Bureau of the Census; or

[“(B) any other unit of local government which is a town or township and which, in the determination of the Administration—

[“(i) possesses powers and performs functions comparable to those associated with municipalities;

[“(ii) is closely settled; and

[“(iii) contains within its boundaries no incorporated places as defined by the United States Bureau of the Census;

[“(14) ‘population’ means total resident population based on data compiled by the United States Bureau of the Census and referable to the same point or period in time;

[“(15) ‘Attorney General’ means the Attorney General of the United States or his designee;

[“(16) ‘court of last resort’ means that State court having the highest and final appellate authority of the State. In States having two or more such courts, court of last resort shall mean that State court, if any, having highest and final appellate authority, as well as both administrative responsibility for the State’s judicial system and the institutions of the State judicial branch and rulemaking authority. In other States having two or more courts with highest and final appellate authority, court of last resort shall mean the highest appellate court which also has either rulemaking authority or administrative responsibility for the State’s judicial system and the institutions of the State judicial branch. Except as used in the definition of the term ‘court of last resort’ the term ‘court’ means a tribunal recognized as a part of the judicial branch of a State or of its local government units;

[“(17) ‘institution of higher education’ means any such institution as defined by section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)), subject, however, to such modifications and extensions as the Administration may determine to be appropriate;

[“(18) ‘white-collar crime’ means an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage;

[“(19) ‘proven effectiveness’ means that a program, project, approach, or practice has been shown by analysis of performance and results to make a significant contribution to the accomplishment of the objectives for which it was undertaken or to have a significant effect in improving the condition or problem it was undertaken to address;

[“(20) ‘record of proven success’ means that a program, project, approach, or practice has been demonstrated by evaluation or by analysis of performance data and information to be successful in a number of jurisdictions or over a period of time in contributing to the accomplishment of objectives or to improving conditions identified with the problem, to which it is addressed; and

[“(21) ‘high probability of improving the criminal justice system’ means that a prudent assessment of the concepts and implementation plans included in a proposed program, project, approach, or practice, together with an assessment of the problem to which it is addressed and of data and information bearing on the problem, concept, and implementation plan, provides strong evidence that the proposed activities would result in identifiable improvements in the criminal justice system if implemented as proposed.

[“(b) Where appropriate, the definitions in subsection (a) shall be based, with respect to any fiscal year, on the most recent data compiled by the United States Bureau of the Census and the latest published reports of the Office of Management and Budget available ninety days prior to the beginning of such fiscal year. The Administration may by regulation change or otherwise modify the meaning of the terms defined in subsection (a) in order to reflect any technical change or modification thereof made subsequent to such date by the United States Bureau of the Census or the Office of Management and Budget.

“(c) One or more public agencies, including existing local public agencies, may be designated by the chief executive officer of a State or a unit of local government to undertake a program or project in whole or in part.

[“PART J—FUNDING

[“AUTHORIZATION OF APPROPRIATIONS

[“SEC. 1001. There is authorized to be appropriated to carry out the functions of the Bureau of Justice Statistics $25,000,000 for the fiscal year ending September 30, 1980; $25,000,000 for the fiscal year ending September 30, 1981; $25,000,000 for the fiscal year ending September 30, 1982; and $25,000,000 for the fiscal year ending September 30, 1983. There is authorized to be appropriated to carry out the functions of the National Institute of Justice $25,000,000 for the fiscal year ending September 30, 1980; $25,000,000 for the fiscal year ending September 30, 1981; $25,000,000 for the fiscal year ending September 30, 1982; and $25,000,000 for the fiscal year ending September 30, 1983. There is authorized to be appropriated for parts D, E, F, G, H, and J, and for the purposes of carrying out the remaining functions of the Law Enforcement Assistance Administration, other than part L, $750,000,000 for the fiscal year ending September 30, 1980; $750,000,000 for the fiscal year ending September 30, 1981; $750,000,000 for the fiscal year ending September 30, 1982; and $750,000,000 for the fiscal year ending September 30, 1983. Funds appropriated for any fiscal year may remain available for obligation until expended. There is authorized to be appropriated in each fiscal year such sums as may be necessary to carry out the purposes of part L.

[“MAINTENANCE OF EFFORT

[“SEC. 1002. In addition to the funds appropriated under section 261(a) of the Juvenile Justice and Delinquency Prevention Act of 1974, there shall be maintained from appropriations for each fiscal year, at least 19.15 per centum of the total appropriations under this title, for juvenile delinquency programs, with primary emphasis on programs for juveniles convicted of criminal offenses or adjudicated delinquent on the basis on an act which would be a criminal offense if committed by an adult.

[“AUTHORIZATION OF APPROPRIATIONS FOR OFFICE OF ANTI-CRIME PROGRAMS

[“SEC. 1003. There are authorized to be appropriated for the purposes of carrying out the functions of the Office of Community Anti-Crime programs $25,000,000 for the fiscal year ending September 30, 1980; $25,000,000 for the fiscal year ending September 30, 1981; $25,000,000 for the fiscal year ending September 30, 1982; and $25,000,000 for the fiscal year ending September 30, 1983.

[“PART K—CRIMINAL PENALTIES

[“MISUSE OF FEDERAL ASSISTANCE

[“SEC. 1101. Whoever embezzles, willfully misapplies, steals, or obtains by fraud or endeavors to embezzle, willfully misapply, steal, or obtain by fraud any funds, assets, or property which are the subject of a grant or contract or other form of assistance pursuant to this title, whether received directly or indirectly from the Law Enforcement Assistance Administration, the National Institute of Justice, the Bureau of Justice Statistics, or whoever receives, conceals, or retains such funds, assets or property with intent to convert such funds, assets or property to his use or gain, knowing such funds, assets, or property has been embezzled, willfully misapplied, stolen or obtained by fraud, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

[“FALSIFICATION OR CONCEALMENT OF FACTS

[“Sec. 1102. Whoever knowingly and willfully falsifies, conceals, or covers up by trick, scheme, or device, any material fact in any application for assistance submitted pursuant to this title or in any records required to be maintained pursuant to this title shall be subject to prosecution under the provisions of section 1001 of title 18, United States Code.

[“CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES

[“Sec. 1103. Any law enforcement or criminal justice program or project underwritten, in whole or in part, by any grant, or contract or other form of assistance pursuant to this title, whether received directly or indirectly from the Law Enforcement Assistance Administration, the National Institute of Justice, or the Bureau of Justice Statistics shall be subject to the provisions of section 371 of title 18, United States Code.

[“Part L—Public Safety Officers' Death Benefits

[“PAYMENTS

“Sec. 1201. (a) In any case in which the Administration determines, under regulations issued pursuant to this part, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Administration shall pay a benefit of $50,000, as follows:

[“(1) if there is no surviving child of such officer, to the surviving spouse of such officer;

[“(2) if there is a surviving child or children and a surviving spouse, one-half to the surviving child or children of such officer in equal shares and one-half to the surviving spouse;

[“(3) if there is no surviving spouse, to the child or children of such officer in equal shares; or

[“(4) if none of the above, to the dependent parent or parents of such officer in equal shares.

[“(b) Whenever the Administration determines upon a showing of need and prior to taking final action, that the death of a public safety officer is one with respect to which a benefit will probably be paid, the Administration may make an interim benefit payment not exceeding $3,000 to the person entitled to receive a benefit under subsection (a) of this section.

[“(c) The amount of an interim payment under subsection (b) shall be deducted from the amount of any final benefit paid to such person.

[“(d) Where there is no final benefit paid, the recipient of any interim payment under subsection (b) shall be liable for repayment of such amount. The Administration may waive all or part of such repayment, considering for this purpose the hardship which would result from such repayment.

[“(e) The benefit payable under this part shall be in addition to any other benefit that may be due from any other source, but shall be reduced by—

[“(1) payments authorized by section 8191 of title 5, United States Code; or

[“(2) payments authorized by section 12(k) of the Act of September 1, 1916, as amended (D.C. Code, sec. 4-531(1)).

[“(f) No benefit paid under this part shall be subject to execution or attachment.

[“LIMITATIONS

[“SEC. 1202. No benefit shall be paid under this part—

[“(1) if the death was caused by the intentional misconduct of the public safety officer or by such officer's intention to bring about his death;

[“(2) if voluntary intoxication of the public safety officer was the proximate cause of such officer's death; or

[“(3) to any person who would otherwise be entitled to a benefit under this part if such person's actions were a substantial contributing factor to the death of the public safety officer.

[“DEFINITIONS

[“SEC. 1203. As used in this part—

[“(1) ‘child’ means any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the time of the public safety officer's death, is—

[“(i) eighteen years of age or under;

[“(ii) over eighteen years of age and a student as defined in section 8101 of title 5, United States Code; or

[“(iii) over eighteen years of age and incapable of self-support because of phsycial or mental disability;

[“(2) ‘dependent’ means a person who was substantially reliant for support upon the income of the deceased public safety officer;

[“(3) ‘fireman’ includes a person serving as an officially recognized or designated member of a legally organized volunteer fire department;

[“(4) ‘intoxication’ means a disturbance of mental or physical faculties resulting from the introduction of alcohol, drugs, or other substances into the body;

[“(5) ‘law enforcement officer’ means a person involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws. This includes, but is not limited to, police, corrections, probation, parole, and judicial officers;

[“(6) ‘public agency’ means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Somoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States, or any unit of local government, combination of such States, or units, or any department, agency, or instrumentality of any of the foregoing; and

[“(7) ‘public safety officer’ means a person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or a fireman.

[“ADMINISTRATIVE PROVISIONS

[“SEC. 1204. (a) The Administration is authorized to establish such rules, regulations, and procedures as may be necessary to carry out the purposes of this part. Such rules, regulations, and procedures will be determinative of conflict of laws issues arising under this part. Rules, regulations, and procedures issued under this part may include regulations governing the recognition of agents or other persons representing claimants under this part before the Administration. The Administration may prescribe the maximum fees which may be charged for services performed in connection with any claim under this part before the Administration, and any agreement in violation of such rules and regulations shall be void.

[“(b) In making determinations under section 1201, the Administration may utilize such administrative and investigative assistance as may be available from State and local agencies. Responsibility for making final determinations shall rest with the Administration.

[“PART M—TRANSITION—EFFECTIVE DATE—REPEALER

[“CONTINUATION OF RULES, AUTHORITIES, AND PROCEEDINGS

[“SEC. 1301. (a) All orders, determinations, rules, regulations, and instructions of the Law Enforcement Assistance Administration which are in effect on the date of the enactment of the Justice System Improvement Act of 1979 shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by the President or the Attorney General, the Office of Justice Assistance, Research, and Statistics or the Director of the Bureau of Justice Statistics, the National Institute of Justice, or the Administrator of the Law Enforcement Assistance Administration with respect to their functions under this title or by operation of law.

[“(b) The Director of the National Institute of Justice may award new grants, enter into new contracts or cooperative agreements, or otherwise obligate previously appropriated unused or reversionary funds for the continuation of research and development projects in accordance with the provisions of this title as in effect on the day before the date of the enactment of the Justice System Improvement Act of 1979, based upon applications received under this title before the date of the enactment of such Act or for purposes consistent with provisions of this title.

[“(c) The Director of the Bureau of Justice Statistics may award new grants, enter into new contracts or cooperative agreements or otherwise obligate funds appropriated for fiscal years before 1980 for statistical projects to be expended in accordance with the provisions of this title, as in effect on the day before the date of the enactment of the Justice System Improvement Act of 1979, based upon applications received under this title before the date of the enactment of such Act or for purposes consistent with provisions of this title.

[“(d) The Adminstrator of the Law Enforcement Assistance Administration may award new grants, enter into new contracts or cooperative agreements, approve comprehensive plans for the fiscal year beginning October 1, 1979, and otherwise obligate previously appropriated unused or reversionary funds or funds appropriated for the fiscal year beginning October 1, 1979, for the continuation of projects in accordance with the provisions of this title, as in effect on the day before the date of the enactment of the Justice System Improvement Act of 1979 or for purposes consistent with provisions of this title.

[“(e) The amendments made to this title by the Justice System Improvement Act of 1979 shall not affect any suit, action, or other proceeding commenced by or against the Government before the date of the enactment of such Act.

[“(f) Nothing in this title prevents the utilization of funds appropriated for purposes of this title for all activities necessary or appropriate for the review, audit, investigation, and judicial or administrative resolution of audit matters for those grants or contracts that were awarded under this title. The final disposition and dissemination of program and project accomplishments with respect to programs and projects approved in accordance with this title, as in effect before the date of the enactment of the Justice System Improvement Act of 1979, which continue in operation beyond the date of the enactment of such Act may be carried out with funds appropriated for purposes of this title.

[“(g) Except as otherwise provided in this title, the personnel employed on the date of enactment of the Justice System Improvement Act of 1979 by the Law Enforcement Assistance Administration are transferred as appropriate to the Office of Justice Assistance, Research and Statistics, the National Institute of Justice or the Bureau of Justice Statistics, considering the function to be performed by the these organizational units and the functions previously performed by the employee. Determinations as to specific positions to be filled in an acting capacity for a period of not more than ninety days by the Administrator and Deputy Administrators employed on the date of enactment of the Justice System Improvement Act of 1979 may be made by the Attorney General notwithstanding any other provision of law.

[“(h) Any funds made available under parts B, C, and E of this title, as in effect before the date of the enactment of the Justice System Improvement Act of 1979, which are not obligated by a State or unit of local government, may be used to provide up to 100 per centum of the cost of any program or project.

[“(i) Notwithstanding any other provision of this title, all provisions of this title, as in effect on the day before the date of the enactment of the Justice System Improvement Act of 1979, which are necessary to carry out the provisions of the Juvenile Justice and Delinquency Prevention Act of 1974, remain in effect for the sole purpose of carrying out the Juvenile Justice and Delinquency Prevention Act of 1974 and the State criminal justice council established under this title shall serve as the State planning agency for the purposes of the Juvenile Justice and Delinquency Prevention Act of 1974.

[“(j) The functions, powers, and duties specified in this title to be carried out by State criminal justice councils or by local offices may be carried out be agencies previously established or designated as State, regional, or local planning agencies, pursuant to this title, as in effect before the date of the enactment of the Justice System Improvement Act of 1979, if they meet the representation requirement of section 402 of this title within two years of the date of the enactment of the Justice System Improvement Act of 1979.

[“(k) Notwithstanding the provisions of section 404(c)(3), any construction projects which were funded under this title, as in effect before the date of the enactment of the Justice System Improvement Act of 1979, and which were budgeted in anticipation of receiving additional Federal funding for such construction may continue for two years to be funded under this title.”.]

“TITLE I—JUSTICE ASSISTANCE

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"ESTABLISHMENT OF OFFICE OF JUSTICE ASSISTANCE

"Sec. 101. There is hereby established an Office of Justice Assistance within the Department of Justice under the general authority of the Attorney General. The Office of Justice Assistance (hereafter referred to in this title as the 'Office') shall be headed by an Assistant Attorney General appointed by the President, by and with the consent of the Senate. The Assistant Attorney General shall have authority to award all grants, cooperative agreements, and contracts authorized under this title.

"DUTIES AND FUNCTIONS OF ASSISTANT ATTORNEY GENERAL

"Sec. 102. (a) The Assistant Attorney General shall—

"(1) publish and disseminate information on the conditions and progress of the criminal justice systems;

"(2) maintain liaison with the executive and judicial branches of the Federal and State Governments in matters relating to justice research and statistics, and cooperate in assuring as much uniformity as feasible in statistical systems of the executive and judicial branches;

"(3) provide information to the President, the Congress, the judiciary, State and local govenments, and the general public on justice research and statistics;

"(4) maintain liaison with public and private educational and research institutions, State and local governments, and governments of other nations concerning justice research and statistics;

"(5) cooperate in and participate with national and international organizations in the development of uniform justice statistics;

"(6) insure conformance with security and privacy regulations issued pursuant to section 810 and, identify, analyze and participate in the development and implementation of privacy, security and information policies which impact on Federal and State criminal justice operations and related statistical activities;

"(7) directly provide staff support to, supervise and coordinate the activities of the Bureau of Justice Programs, the Bureau of Criminal Justice Facilities, the National Institute of Justice, the Bureau of Justice Statistics and the Office of Juvenile Justice and Delinquency Prevention;

"(8) exercise the powers and functions set out in part G; and

"(9) exercise such other powers and functions as may be vested in the Assistant Attorney General pursuant to this title or by delegation of the Attorney General.

"(b) The Attorney General shall submit an annual report to the President and to the Congress not later than March 31 of each year. Each annual report shall describe the activities carried out under the provisions of this title and shall contain such findings and recommendations as the Attorney General considers necessary or appropriate after consultation with the Assistant Attorney General and the Advisory Board.

"ADVISORY BOARD

"SEC. 103. (a) There is hereby established a Justice Assistance Board (hereinafter referred to as the 'Board'). The Board shall consist of not more than twenty-one members who shall be appointed by the President. The members shall include representatives of the public, various components of the criminal justice system at all levels of government, and persons experienced in the criminal justice system, including the design, operation and management of programs at the State and local level. The President shall designate from among its members a Chairman and Vice Chairman. The Vice Chairman is authorized to sit and act in the place of the Chairman in the absence of the Chairman. The Assistant Attorney General shall be a non-voting member of the Board and shall not serve as Chairman or Vice Chairman. Vacancies in the membership of the Board shall not affect the power of the remaining members to execute the functions of the Board and shall be filled in the same manner as in the case of an original appointment.

"(b) The Board may make such rules respecting organization and procedures as it deems necessary, except that no recommendation

shall be reported from the Board unless a majority of the full Board assents.

"(c) The members of the Board shall serve at the pleasure of the President and shall have no fixed term. The members of the Board shall receive compensation for each day engaged in the actual performance of duties vested in the Board at rates of pay not in excess of the daily equivalent of the highest rate of basic pay then payable in the General Schedule of section 5332(a) of title 5, United States Code, and in addition shall be reimbursed for travel, subsistence, and other necessary expenses.

"(d) The Board shall—

"(1) advise and make recommendations to the Assistant Attorney General on the policies and priorities of the Bureau of Justice Programs, the Bureau of Criminal Justice Facilities, the National Institute of Justice and the Bureau of Justice Statistics in research, statistics and program priorities;

"(2) review demonstration programs funded under part B, and evaluations thereof, and advise the Assistant Attorney General of the results of such review and evaluations; and

"(3) undertake such additional related tasks as the Board may deem necessary.

"(e) In addition to the powers and duties set forth elsewhere in this title, the Assistant Attorney General shall exercise such powers and duties of the Board as may be delegated to the Assistant Attorney General by the Board.

"(f) The Assistant Attorney General shall provide staff support to assist the Board in carrying out its activities.

"PART B—BUREAU OF JUSTICE PROGRAMS

"ESTABLISHMENT OF BUREAU OF JUSTICE PROGRAMS

"SEC. 201. (a) There is established within the Office of Justice Assistance a Bureau of Justice Programs (hereinafter referred to in this part as the "Bureau").

"(b) The Bureau shall be headed by a Director who shall be appointed by the Attorney General. The director shall not engage in any employment other than that of serving as the Director, nor shall the Director hold any office in, or act in any capacity for, any organization, agency, or institution with which the Bureau makes any contract or other arrangement under this title.

"DUTIES AND FUNCTIONS OF DIRECTOR

"SEC. 202. The Director shall—

"(1) provide funds to eligible States, units of local government and private nonprofit organizations pursuant to part E and part F;

"(2) establish priorities for programs in accordance with part E and, following public announcement of such priorities, award and allocate funds and technical assistance in accordance with the criteria of part F and on terms and conditions determined by the Director to be consistent with part F;

"(3) cooperate with and provide technical assistance to States, units of local government, and other public and private organi-

zations or international agencies involved in criminal justice activities;

"(4) provide for the development of technical assistance and training programs for State and local criminal justice agencies and foster local participation in such activities;

"(5) encourage the targeting of State and local resources on efforts to reduce the incidence of violent crime and on programs relating to the apprehension and prosecution of repeat offenders;

"(6) advise and make recommendations to the Assistant Attorney General on the policies and priorities of the Office relating to the Bureau; and

"(7) exercise such other powers and functions as may be vested in the Director pursuant to this title.

"PART C—NATIONAL INSTITUTE OF JUSTICE

"NATIONAL INSTITUTE OF JUSTICE

"SEC. 301. It is the purpose of this part to establish a National Institute of Justice, which shall provide for and encourage research and demonstration efforts for the purpose of—

"(1) improving Federal, State and local criminal justice systems and related aspects of the civil justice system;

"(2) preventing and reducing crimes;

"(3) insuring citizen access to appropriate dispute-resolution forums;

"(4) improving efforts to detect, investigate, prosecute, and otherwise combat and prevent white-collar crime and public corruption; and

"(5) identifying programs of proven and demonstrated success or programs which are likely to be successful.

The Institute shall have authority to engage in and encourage research and development to improve and strengthen the criminal justice system and related aspects of the civil justice system and to disseminate the results of such efforts to units of Federal, State, and local governments, to develop alternatives to judicial resolution of disputes, to evaluate the effectiveness of programs funded under this title, to develop and demonstrate new or improved approaches and techniques, to improve and strengthen the administration of justice, and to identify programs or projects carried out under this title which have demonstrated success in improving the quality of justice systems and which offer the likelihood of success if continued or repeated. In carrying out the provisions of this part the Institute shall give primary emphasis to the problems of State and local justice systems.

"ESTABLISHMENT, DUTIES, AND FUNCTIONS

"SEC. 302. (a) There is established within the Office of Justice Assistance a National Institute of Justice (hereinafter referred to in this title as the "Institute").

"(b) The Institute shall be headed by a Director appointed by the Attorney General. The Director shall have had experience in justice research. The Director shall have such authority as delegated by the

Assistant Attorney General to make grants, cooperative agreements, and contracts awarded by the Institute. The Director shall not engage in any other employment than that of serving as Director; nor shall the Director hold any office in, or act in any capacity for, any organization, agency, or institution with which the Institute makes any contract or other arrangements under this title.

"(c) The Institute is authorized to—

"(1) make grants to, or enter into cooperative agreements or contracts with, States, units of local government or combinations thereof, public agencies, institutions of higher education, private organizations, or individuals to conduct research, demonstration or special projects pertaining to the purposes described in this part, and provide technical assistance and training in support of tests, demonstrations, and special projects;

"(2) conduct or authorize multiyear and short-term research and development concerning the criminal and civil justice systems in an effort—

"(A) to identify alternative programs for achieving system goals;

"(B) to provide more accurate information on the causes and correlates of crime;

"(C) to analyze the correlates of crime and juvenile delinquency and provide more accurate information on the causes and correlates of crime and juvenile delinquency;

"(D) to improve the functioning of the criminal justice system;

"(E) to develop new methods for the prevention and reduction of crime, including but not limited to the development of programs to facilitate cooperation among the States and units of local government, the detection and apprehension of criminals, the expeditious, efficient, and fair disposition of criminal and juvenile delinquency cases, the improvement of police and minority relations, the conduct of research into the problems of victims and witnesses of crime, the feasibility and consequences of allowing victims to participate in criminal justice decisionmaking, the feasibility and desirability of adopting procedures and programs which increase the victim's participation in the criminal justice process, the reduction in the need to seek court resolution of civil disputes, and the development of adequate corrections facilities and effective programs of correction; and

"(F) to develop programs and projects to improve and expand the capacity of States and units of local government and combinations of such units, to detect, investigate, prosecute, and otherwise combat and prevent white-collar crime and public corruption, to improve and expand cooperation among the Federal Government, States, and units of local government in order to enhance the overall criminal justice system response to white-collar crime and public corruption, and to foster the creation and implementation of a comprehensive national strategy to prevent and combat white-collar crime and public corruption.

In carrying out the provisions of this subsection, the Institute may request the assistance of both public and private research agencies;

"(3) evaluate the effectiveness of projects or programs carried out under this title;

"(4) make recommendations to the Assistant Attorney General for action which can be taken by units of Federal, State, and local governments and by private persons and organizations to improve and strengthen criminal and civil justice systems;

"(5) provide research fellowships and clinical internships and carry out programs of training and special workshops for the presentation and dissemination of information resulting from research, demonstrations, and special projects including those authorized by this part;

"(6) collect and disseminate information obtained by the Institute or other Federal agencies, public agencies, institutions of higher education, and private organizations relating to the purposes of this part;

"(7) serve as a national and international clearinghouse for the exchange of information with respect to the purposes of this part; and

"(8) encourage, assist, and serve in a consulting capacity to Federal, State, and local justice system agencies in the development, maintenance, and coordination of criminal and civil justice programs and services;

"(9) advise and make recommendations to the Assistant Attorney General on the policies and priorities of the Office relating to the Institute; and

"(10) exercise such administrative functions under part H as may be delegated by the Assistant Attorney General.

"(d) To insure that all criminal and civil justice research is carried out in a coordinated manner, the Institute is authorized to—

"(1) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefore;

"(2) confer with and avail itself of the cooperation, services, records, and facilities of State or of municipal or other local agencies;

"(3) request such information, data, and reports from any Federal agency as may be required to carry out the purposes of this section, and the agencies shall provide such information to the Institute as required to carry out the purposes of this part;

"(4) seek the cooperation of the judicial branches of Federal and State Government in coordinating civil and criminal justice research and development.

"AUTHORITY FOR 100 PER CENTUM GRANTS

"SEC. 303. A grant authorized under this part may be up to 100 per centum of the total cost of each project for which such grant is made. The Institute shall require, whenever feasible, as a condition of approval of a grant under this part, that the recipient contribute-

money, facilities, or services to carry out the purposes for which the grant is sought.

"PART D—BUREAU OF JUSTICE STATISTICS

"BUREAU OF JUSTICE STATISTICS

"SEC. 401. It is the purpose of this part to provide for and encourage the collection and analysis of statistical information concerning crime, juvenile delinquency, and the operation of the criminal justice system and related aspects of the civil justice system and to encourage the development of information and statistical systems at the Federal, State, and local levels to improve the efforts of these levels of government to measure and understand the levels of crime, juvenile delinquency, and the operation of the criminal justice system and related aspects of the civil justice system. The Bureau shall give primary emphasis to the needs of State and local justice systems, both individually and as a whole.

"ESTABLISHMENT, DUTIES, AND FUNCTIONS

"SEC. 402. (a) There is established within the Office of Justice Assistance a Bureau of Justice Statistics (hereinafter referred to in this part as the 'Bureau').

"(b) The Bureau shall be headed by a Director appointed by the Attorney General. The Director shall have had experience in statistical programs. The Director shall have such authority as delegated by the Assistant Attorney General to make grants, cooperative agreements, and contracts awarded by the Bureau. The Director shall not engage in any other employment than that of serving as Director; nor shall the Director hold any office in, or act in any capacity for, any organization, agency, or institution with which the Bureau makes any contract or other arrangement under this Act.

"(c) The Bureau is authorized to—

"(1) make grants to, or enter into cooperative agreements or contracts with public agencies, institutions of higher education, private organizations, or private individuals for purposes related to this part; grants shall be made subject to continuing compliance with standards for gathering justice statistics set forth in rules and regulations promulgated by the Director;

"(2) collect and analyze information concerning criminal victimization, including crimes against the elderly, and civil disputes;

"(3) collect and analyze data that will serve as a continuous and comparable national social indication of the prevalence, incidence, rates, extent, distribution, and attributes of crime, juvenile delinquency, civil disputes, and other statistical factors related to crime, civil disputes, and juvenile delinquency, in support of National, State, and local justice policy and decisionmaking;

"(4) collect and analyze statistical information concerning the operations of the criminal justice system at the Federal, State, and local levels;

"(5) collect and analyze statistical information concerning the prevalence, incidence, rates, extent, distribution, and attributes

of crime, and juvenile delinquency, at the Federal, State, and local levels.

"(6) analyze the correlates of crime, civil disputes and juvenile delinquency, by the use of statistical information, about criminal and civil justice systems at the Federal, State, and local levels, and about the extent, distribution and attributes of crime, and juvenile delinquency, in the Nation and at the Federal, State, local levels;

"(7) compile, collate, analyze, publish, and disseminate uniform national statistics concerning all aspects of criminal justice and related aspects of civil justice, crime, including crimes against the elderly, juvenile delinquency, criminal offenders, juvenile delinquents, and civil disputes in the various States;

"(8) recommend to the Assistant Attorney General national standards for justice statistics and for insuring the reliability and validity of justice statistics supplied pursuant to this title;

"(9) establish or assist in the establishment of a system to provide State and local governments with access to Federal informational resources useful in the planning, implementation, and evaluation of programs under this Act;

"(10) conduct or support research relating to methods of gathering or analyzing justice statistics;

"(11) provide for the development of justice information systems programs and assistance to the States and units of local government relating to collection, analysis, or dissemination of justice statistics;

"(12) develop and maintain a data processing capability to support the collection, aggregation, analysis and dissemination of information on the incidence of crime and the operation of the criminal justice system;

"(13) collect, analyze and disseminate comprehensive Federal justice transaction statistics (including statistics on issues of Federal justice interest such as public fraud and high technology crime) and to provide assistance to and work jointly with other Federal agencies to improve the availability and quality of Federal justice data and other justice information;

"(14) insure conformance with security and privacy requirements of section 810 and regulations issued pursuant thereto;

"(15) advise and make recommendations to the Assistant Attorney General on the policies and priorities of the Office relating to the Bureau; and

"(16) exercise such administrative functions under part H as may be delegated by the Assistant Attorney General.

"(d) To insure that all justice statistical collection, analysis, and dissemination is carried out in a coordinated manner, the Bureau is authorized to—

"(1) utilize, with their consent, the services, equipment, records, personnel, information, and facilities of other Federal, State, local and private agencies and instrumentalities with or without reimbursement therefore, and to enter into agreements with the aforementioned agencies and instrumentalities for purposes of data collection and analysis;

"(2) confer and cooperate with State, municipal, and other local agencies;

"(3) request such information, data, and reports from any Federal agency as may be required to carry out the purposes of this title;

"(4) seek the cooperation of the judicial branch of the Federal Government in gathering data from criminal justice records; and

"(5) encourage replication, coordination and sharing among justice agencies regarding information systems, information policy, and data.

"(e) Federal agencies requested to furnish information, data, or reports pursuant to subsection (d)(3) shall provide such information to the Bureau as is required to carry out the purposes of this section.

"(f) In recommending standards for gathering justice statistics under this section, the Bureau shall consult with representatives of State and local government, including, where appropriate, representatives of the judiciary.

"AUTHORITY FOR 100 PER CENTUM GRANTS

"SEC. 403. A grant authorized under this part may be up to 100 per centum of the total cost of each project for which such grant is made. The Bureau shall require, whenever feasible as a condition of approval of a grant under this part, that the recipient contribute money, facilities, or services to carry out the purposes for which the grant is sought.

"USE OF DATA

"SEC. 404. Data collected by the Bureau shall be used only for statistical or research purposes, and shall be gathered in a manner that precludes their use for law enforcement or any purpose relating to a particular individual other than statistical or research purposes.

"PART E—STATE AND LOCAL ALLOCATIONS

"DESCRIPTION OF PROGRAM

"SEC. 501. (a) It is the purpose of this part to assist States and units of local government in carrying out specific programs of proven effectiveness or which offer a high probability of improving the functions of the criminal justice systems and which focus primarily on violent crime and serious offenders. The Bureau of Justice Programs (hereinafter referred to in this part as the 'Bureau') is authorized, pursuant to authority delegated by the Assistant Attorney General, to establish criteria and make grants under this part to States for the purpose of funding specific programs and projects that—

"(1) increase the conviction rate of repeat or violent offenders through focused enforcement and prosecution units which target serious offenders for special prosecution action;

"(2) address the problem of serious and violent offenses committed by juveniles;

"(3) combat arson;

"(4) disrupt illicit commerce in stolen goods and property;

"(5) improve assistance (other than compensation) to crime victims and witnesses;

"(6) improve the operational effectiveness of law enforcement by integrating and maximizing the effectiveness of police field operations and the use of crime analysis techniques;

"(7) encourage citizen action in crime prevention and cooperation with law enforcement;

"(8) reduce recidivism among drug or alcohol abusing offenders;

"(9) improve workload management systems for prosecutors and expedite felony case processing by the courts;

"(10) provide training and technical assistance to justice personnel;

"(11) provide programs which alleviate prison and jail overcrowding, including alternatives to pretrial detention and alternative programs for non-violent offenders;

"(12) implement programs that address critical problems of crime, such as drug trafficking, which have been certified by the Director, after consultation with the directors of National Institute of Justice, Bureau of Justice Statistics and the Office of Juvenile Justice and Delinquency Prevention, as having proved successful or which are innovative and have been deemed by the Director likely to prove successful.

"FEDERAL SHARE

"SEC. 502. (a) The Federal portion of any grant to a State made under this part shall be 50 per centum of the aggregate cost of programs and projects specified in the application for such grant.

"(b) The non-Federal portion of the cost of such programs or project shall be in cash.

"(c) In the case of a grant to an Indian tribe or other aboriginal group, the Bureau may increase the Federal portion of the cost of such program to the extent the Bureau deems necessary if the Bureau determines that the tribe or group does not have sufficient funds available to meet the non-Federal portion of such cost.

"(d) The Bureau may provide financial aid and assistance to programs or projects under this part for a period not to exceed three years.

"APPLICATIONS

"SEC. 503. (a) No grant may be made by the Bureau to a State, or by a State to an eligible recipient pursuant to part E, unless the application sets forth criminal justice programs covering a two-year period which meet the objectives of section 501, designates which objective specified in section 501(a) each such program is intended to achieve, and identifies the State agency or unit of local government which will implement each such program. This application must be amended annually if new programs are to be added to the application or if the programs contained in the original application are not implemented. The application must include—

"(1) an assurance that following the first fiscal year covered by an application and each fiscal year thereafter, the applicant shall submit to the Bureau, where the applicant is a State;

"*(A) a performance report concerning the activities carried out pursuant to this title; and*

"*(B) an assessment by the applicant of the impact of those activities on the objectives of this title and the needs and objectives identified in the applicant's statement;*

"*(2) a certification that Federal funds made available under this title will not be used to supplant State or local funds, but will be used to increase the amounts of such funds that would, in the absence of Federal funds, be made available for criminal justice activities;*

"*(3) fund accounting, auditing, monitoring, and such evaluation procedures as may be necessary to keep such records as the Bureau shall prescribe will be provided to assure fiscal control, proper management, and efficient disbursement of funds received under this title;*

"*(4) an assurance that the State will maintain such data and information and submit such reports in such form, at such times and containing such data and information as the Bureau may reasonably require to administer other provisions of this title;*

"*(5) a certification that its programs meet all the requirements of this section, that all the information contained in the application is correct, that there has been appropriate coordination with affected agencies, and that the applicant will comply with all provisions of this title and all other applicable Federal laws. Such certification shall be made in a form acceptable to the Bureau and shall be executed by the chief executive or other officer of the applicant qualified under regulations promulgated by the Bureau;*

"*(6) satisfactory assurances that equipment, whose purchase was previously made in connection with a program or project in such State assisted under this title and whose cost in the aggregate was $100,000 or more, has been put into use not later than one year after the date set at the time of purchase for the commencement of such use and has continued in use during its useful life.*

"*REVIEW OF APPLICATIONS*

"*SEC. 504. (a) The Bureau shall provide financial assistance to each State applicant under this part to carry out the programs or projects submitted by such applicant upon determining that the application or amendment thereof is consistent with requirements of this title and with the priorities and criteria established by the Bureau under section 501. Each application or amendment made and submitted for approval to the Bureau pursuant to section 503 of this title shall be deemed approved, in whole or in part, by the Bureau within sixty days after first received unless the Bureau informs the applicant of specific reasons for disapproval.*

"*(b) The Bureau shall suspend funding for an approved application in whole or in part if such application contains a program or project which has failed to conform to the requirements or statutory objectives of this Act. The Bureau may make appropriate adjust-*

ments in the amounts of grants in accordance with its findings pursuant to this subsection.

"(c) Grant funds awarded under this part and part F shall not be used for—

"(1) the purchase of equipment or hardware, or the payment of personnel costs, unless the cost of such purchases and payments is incurred as an incidental and necessary part of a program under section 501(a);

"(2) programs which have as their primary purpose general salary payments for employees or classes of employees within an eligible jurisdiction, except for the compensation of personnel for time engaged in conducting or undergoing training programs or the compensation of personnel engaged in research, development, demonstration, or short-term programs;

"(3) construction projects; or

"(4) programs or projects which, based upon evaluations by the Bureau, the National Institute of Justice, Bureau of Justice Statistics, State or local agencies, and other public or private organizations, have been demonstrated to offer a low probability of improving the functioning of the criminal justice system. Such programs must be formally identified by a notice in the Federal Register after opportunity for comment.

"(d) The Bureau shall not finally disapprove any application submitted to the Director under this part, or any amendments thereof, without first affording the applicant reasonable notice and opportunity for reconsideration.

"DISTRIBUTION OF FUNDS

"SEC. 505. (a) Of the total amount appropriated for this part and part F in any fiscal year, 80 per centum shall be set aside for this part and 20 per centum shall be set aside for part F. Funds set aside for this part shall be allocated to States as follows:

"(1) $250,000 shall be allocated to each of the participating States.

"(2) Of the total funds remaining for this part after the allocation under paragraph (1) there shall be allocated to each State an amount which bears the same ratio to the amount of remaining funds described in this subparagraph as the population of such State bears to the population of all the States.

"(b) Notwithstanding the requirements of section 505(a), if the total amount appropriated for this part and part F is less than $80,000,000 in any fiscal year, then the entire amount shall be set aside and reserved for allocation to the States according to the criteria established by the Director to provide for equitable distribution among the States.

"(c)(1) Each State which receives funds under this part in a fiscal year shall distribute among units or local government, or combinations of units of local government, in such State for the purposes specified in section 501(a) not less than that portion of such funds which bears the same ratio to the aggregate amount of such funds as the amount of funds expended by all units of local government for criminal justice in the preceding fiscal year bears to the aggregate amount of funds expended by the State and all units of local

government in such State for criminal justice in such preceding fiscal year.

"(2) In distributing funds received under this part among urban, rural and suburban units of local government and combinations thereof, the State shall give priority to those jurisdictions with the greatest need.

"(3) Any funds not distributed to units of local government under paragraphs (1) and (2) shall be available for expenditure by the State involved.

"(4) For purposes of determining the distribution of funds under paragraphs (1) and (2), the most accurate and complete data available for the fiscal year involved shall be used. If data for such fiscal year are not available, then the most accurate and complete data available for the most recent fiscal year preceding such fiscal year shall be used.

"(d) No funds allocated to a State under subsection (a) or (b) or received by a State for distribution under subsection (c) may be distributed by the Director or by the State involved for any program other than a program contained in an approved application.

"(e) If the Bureau determines, on the basis of information available to it during any fiscal year, that a portion of the funds allocated to a State for that fiscal year will not be required or that a State will be unable to qualify or receive funds under this part, or that a State chooses not to participate in the program established by this part, then such portion shall be awarded by the Director to urban, rural and suburban units of local government or combinations thereof within such State on the basis of criteria to be established by the Director.

"(f) Any funds not distributed under subsections (d) and (e) shall be available for obligation under part F.

"STATE OFFICE

"SEC. 506. (a) The chief executive of each participating State shall designate a State office for purposes of—

"(1) preparing an application to obtain funds under this part; and

"(2) administering funds received from the Bureau of Justice Programs, including receipt, review, processing, monitoring, progress and financial report review, technical assistance, grant adjustments, accounting, auditing, and fund disbursements.

"(b) An office or agency performing other functions within the executive branch of a State may be designated to carry out the functions specified in subsection (a).

"PART F—DISCRETIONARY GRANTS

"PURPOSE

"SEC. 601. (a) The purpose of this part is to provide additional Federal financial assistance to States, units of local government, combinations of such units, and private nonprofit organizations for purposes of—

"(1) educational and training programs for criminal justice personnel;

"(2) providing technical assistance to States and local units of governments;

"(3) projects which are national or multi-State in scope and which address the purposes specified in section 501, and programs to improve the professionalism and performance of criminal justice agencies through the development of standards and voluntary accreditation processes; and

"(4) providing financial assistance to States, units of local government and private nonprofit organizations for demonstration programs which, in view of previous research or experience, are likely to be a success in more than one jurisdiction and are not likely to be funded with moneys from other sources.

"(b) The Director is authorized, pursuant to such authority as delegated by the Assistant Attorney General, to make grants, enter into cooperative agreements, and contracts with, states, units of local governments or combinations thereof, public agencies, institutions of higher education or private organizations.

"(c) The Federal portion of any grants made under this part may be made in amounts up to 100 per centum of the costs of the program or project.

"PROCEDURE FOR ESTABLISHING FUNDING AND SELECTION CRITERIA

"SEC. 602. The Bureau shall annually establish funding priorities and selection criteria for assistance after first providing notice and an opportunity for public comment.

"APPLICATION REQUIREMENTS

"SEC. 603. (a) No grant may be made pursuant to this part unless an application has been submitted to the Bureau in which the applicant—

"(1) sets forth a program or project which is eligible for funding pursuant to this part;

"(2) describes the services to be provided, performance goals and the manner in which the program is to be carried out;

"(3) describes the method to be used to evaluate the program or project in order to determine its impact and effectiveness in achieving the stated goals and agrees to conduct such evaluation according to the procedures and terms established by the Bureau;

"(4) indicates, if it is a private nonprofit organization, that it has consulted with appropriate agencies and officials of the State and units of local government to be affected by the program or project.

"(b) Each applicant for funds under this part shall certify that its program or project meets all the requirements of this section, that all the information contained in the application is correct, and that the applicant will comply with all the provisions of this title and all other applicable Federal laws. Such certification shall be made in a form acceptable to the Bureau.

"PERIOD FOR AWARD

"Sec. 604. The Bureau may provide financial aid and assistance to programs or projects under this part for a period not to exceed three years. Grants made pursuant to this part may be extended or renewed by the Bureau for an additional period of up to two years if—

"(1) an evaluation of the program or project indicates that it has been effective in achieving the stated goals or offers the potential for improving the functioning of the criminal justice system; and

"(2) the State, unit of local government, or combination thereof and private nonprofit organizations within which the program or project has been conducted agrees to provide at least one-half of the total cost of such program or project from part E funds or from any other source of funds, including other Federal grants, available to the eligible jurisdiction. Funding for the management and the administration of national nonprofit organizations under section 601(c) of this part is not subject to the funding limitations of this section.

"Part G—Criminal Justice Facilities

"ESTABLISHMENT OF THE BUREAU OF CRIMINAL JUSTICE FACILITIES

"Sec. 701. (a) There is established within the Office of Justice Assistance a Bureau of Criminal Justice Facilities (hereinafter referred to in this part as the "Bureau").

"(b) The Bureau shall be headed by a Director who shall be appointed by the Attorney General. The Director shall not engage in any employment other than that of serving as the Director, nor shall the Director hold any office in, or act in any capacity for, any organization, agency, or institution with which the Bureau makes any contract or other arrangement under this title.

"FUNCTIONS OF THE BUREAU

"Sec. 702. In order to carry out the purposes of this part, the Bureau shall—

"(1) make grants to States for the construction and modernization of correctional facilities in accordance with sections 704, 705, 706, 707, and 709; and

"(2) provide for the widest practical and appropriate dissemination of information obtained from the programs and projects assisted under this part.

"GRANTS AUTHORIZED FOR THE RENOVATION AND CONSTRUCTION OF CRIMINAL JUSTICE FACILITIES

"Sec. 703. The Director of the Office of Criminal Justice Facilities is authorized to make grants to States in accordance with the provisions of this part for the renovation and construction of correctional facilities beginning October 1, 1984 and ending September 30, 1987.

"ALLOTMENT

"SEC. 704. (a) From the sums appropriated for each fiscal year, the Director shall allot not more than 3 per centum thereof among the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands according to their respective needs.

"(b)(1) From the remaining 97 per centum of such funds the Director—

> *"(A) shall allot to each State with a plan approved pursuant to section 706 an amount which bears the same ratio to 50 per centum of the remaining funds as the population in such State bears to the population in all States; and*
>
> *"(B) from the remaining 50 per centum of the remainder from 705(b)(1), States submitting a State plan approved by the Director shall be awarded assistance under this part based on the relative needs of each State relating to correctional facilities. In determining the relative needs of each State the Director shall consider—*
>
> > *"(i) whether population levels or conditions of confinement in State or local facilities are in violation of the Federal Constitution or State statutes, codes, or standards and the amount and type of assistance required to bring such facilities into compliance with the law;*
> >
> > *"(ii) the numbers and general characteristics of the inmate population, to include factors such as offender ages, offenses, average term of incarceration, and custody status; and*
> >
> > *"(iii) other relevant criteria.*

In allocating assistance under this part, the Director shall give primary consideration to the needs of States which have made satisfactory assurances that they have implemented, or are in the process of implementing, significant measures to reduce overcrowding and improve conditions of confinement in State and local correctional facilities, through legislative, executive, or judicial initiatives.

"(2) Notwithstanding the provisions of subsection (b), during the period within which funds are available under this part, each State with an approved plan shall be entitled to grant or bond interest subsidy assistance totaling no less than one-half of 1 per centum of available funds.

"(3) For the purpose of this section, the term 'State' does not include the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands.

"STATE PLANS

"SEC. 705. (a) Any State desiring to receive its allotment of Federal funds under this part shall, within 180 days following the promulgation of rules implementing this subpart, submit a State-needs assessment and action plan for a three-year period, supplemented by such annual revisions as may be necessary, which is consistent with such basic criteria as the Director may prescribe under section 707. Each such plan shall—

"(1) provide for the administration of the plan by a State agency designated by the chief executive of such State;

"(2) set forth a comprehensive statewide program assessing needs and establishing priorities and action plans which involve both construction and nonconstruction initiatives to relieve overcrowding and improve conditions of confinement in correctional facilities;

"(3) provide satisfactory assurance that the control of funds granted under this part and title to property derived therefrom shall be in a public agency for the uses and purposes provided in this part and that a public agency will administer such funds and property for such purposes;

"(4) provide assurances that the State agency or local government will, after a reasonable period of Federal assistance, pay from non-Federal sources any remaining or continuing construction or nonconstruction costs of the program for which application is made including the cost of programs to be carried out in the facilities for which assistance is sought under this part;

"(5) provide assurances that, to the extent practical, correctional facilities will be used for other criminal justice purposes if they are no longer used for the specific purpose for which they were built;

"(6) provide assurances that the State will take into account the needs and requests of units of general local government in the State and encourage local initiative in the development of projects reducing overcrowding and improving conditions of confinement in corrections facilities not assisted under this part;

"(7) provide, based on requests and relative need, for appropriately balanced allocation of funds between the State and units of general local government within the State and among such units for projects for the construction and modernization of correctional facilities;

"(8) provide for appropriate executive and judicial review of any actions taken by the State agency disapproving an application for which funds are available or terminating or refusing to continue financial assistance to units of general local government or any combination of such units for assistance under this part;

"(9) set forth policies and procedures designed to assure that Federal funds made available under this part will be so used as not to supplant State or local funds, but to increase the amounts of such funds that would in the absence of such Federal funds be made available for the construction and renovation of corrections facilities in the State;

"(10) provide assurances that the State is making diligent efforts, consistent with public safety, to reduce overcrowding and improve programs and conditions of confinement in its correction facilities through legislative, executive, and judicial advanced practice initiatives such as incentives, for greater use of community corrections facilities, development of State corrections standards, more effective use of prisoner classification methods and overcrowding contingency plans, as well as prison industry, education, and work-release programs;

"(11) provide assurances that all projects under this part utilize advanced practices in the design and construction of corrections facilities.

"(b) The Director shall approve a State plan and any revision thereof only if the State plan complies with the requirements set forth in subsection (a).

"BASIC CRITERIA

"SEC. 706. As soon as practicable after enactment of this part, the Director shall by regulation prescribe basic criteria to be applied by the State agency under section 706. In addition to other matters, such basic criteria shall provide the general manner in which the State agency will determine priority of projects based upon—

"(1) the relative needs of the area within such State for correctional facility assistance, particularly where such assistance is necessary to bring existing facilities into compliance with Federal or State law;

"(2) the relative ability of the particular public agency in the area to support a program of construction or modernization; and

"(3) the extent to which the project contributes to an equitable distribution of assistance under this part within the State.

"CLEARINGHOUSE ON THE CONSTRUCTION AND MODERNIZATION OF CRIMINAL JUSTICE FACILITIES

"SEC. 707. The Director shall establish and operate a clearinghouse on the construction and modernization of correctional facilities, which shall collect and disseminate to the public information pertaining to the construction and modernization of correctional facilities, including information concerning ways in which a construction program may be used to improve the administration of the criminal justice system within each State and concerning the provision of inmate health care and other services and programs. The Director is authorized to enter into contracts with public agencies or private organizations to operate the clearinghouse established or designated under this section.

"INTEREST SUBSIDY FOR CRIMINAL JUSTICE FACILITY CONSTRUCTION BONDS

"SEC. 708. (a) The Secretary of the Treasury is authorized to pay to any State or political subdivision thereof which issues obligations described in section 103(a) of the Internal Revenue Code of 1954 which are issued as part of an issue substantially all of the proceeds of which are to be used to finance correctional facilities such amounts as may be necessary to reduce the cost to the issuer of such bonds to a rate of interest not in excess of 5 per centum per annum. Such payments shall be made only upon application of the issuer made in such form, in such manner, and at such times as the Director shall require consistent with the criteria established for allocating funds under section 706 and 707.

"(b) Payments under subsection (a) may be made in advance, by installment, or in any other manner determined by the Secretary, in

consultation with the Director, to be appropriate under the circumstances, and may be made on the basis of estimates, if necessary, with corrections in later payments to the extent necessary to compensate for overpayments or underpayments arising out of errors of estimate or otherwise.

"(c) No State may receive a combination of bond subsidies under this section grant under this part in excess of such State's allocation formula.

"(d) The payment, by the Secretary of any amount under subsection (a) to a State or a political subdivision thereof, shall not affect the status of any such obligation under section 103 of such Code, nor shall it cause the interest thereon to be excludable only in part under such section.

"DEFINITIONS

"SEC. 709. As used in this part—

"(1) The term 'correctional facility' means any prison, jail, reformatory, work farm, detention center, pretrial detention facility, community-based correctional facility, halfway house, or other institution designed for the confinement or rehabilitation of individuals charged with or convicted of any criminal offense, including juvenile offenders.

"(2) The term 'construction' includes the preparation of drawings and specifications for facilities; erecting, building, acquiring, altering, remodeling, renovating, improving, or extending such facilities; and the inspection and supervision of the construction of such facilities. The term does not include interest in land or offsite improvements.

"PART H—ADMINISTRATIVE PROVISIONS

"ESTABLISHMENT OF RULES AND DELEGATION OF FUNCTIONS

"SEC. 801. (a) The Attorney General is authorized, after appropriate consultation with representative of States and units of local government, to establish such rules, regulations, and procedures as are necessary to the exercise of the functions of the Office, the Bureau of Justice Programs, the Bureau of Criminal Justice Facilities, the Institute and the Bureau of Justice Statistics, and as are consistent with the stated purpose of this title.

"(b) The Attorney General may delegate to any of his respective officers or employees such functions as the Attorney General deems appropriate.

"NOTICE AND HEARING ON DENIAL OR TERMINATION OF GRANT

"SEC. 802. (a) Whenever, after reasonable notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code, the Office finds that a recipient of assistance under this title has failed to comply substantially with—

"(1) any provisions of this title;

"(2) any regulations or guidelines promulgated under this title; or

"(3) any application submitted in accordance with the provisions of this title, or the provisions of any other applicable Federal Act;

the Assistant Attorney General, until satisfied that there is no longer any such failure to comply, shall terminate payments to the recipient under this title, reduce payments to the recipient under this title by an amount equal to the amount of such payments which were not expended in accordance with this title, or limit the availability of payments under this title to programs, projects, or activities not affected by such failure to comply.

"(b) If any grant under this title has been terminated, the Bureau of Justice Programs, the Bureau of Criminal Justice Facilities, the National Institute of Justice or the Bureau of Justice Statistics, as appropriate, shall notify the grantee of its action and set forth the reason for the action taken. Whenever such a grantee requests a hearing, the Office, or any authorized officer thereof, is authorized and directed to hold such hearings or investigations, including hearings on the record in accordance with section 554 of title 5, United States Code, at such times and places as necessary, following appropriate and adequate notice to such grantee; and the findings of fact and determinations made with respect thereto shall be final and conclusive, except as otherwise provided herein. The Office is authorized to take final action without a hearing if after an administrative review of the termination it is determined that the basis for the appeal, if substantiated, would not establish a basis for continuation of the grant. Under such circumstances, a more detailed statement of reasons for the agency action should be made available, upon request, to the grantee.

"(c) If such recipient is dissatisfied with the findings and determinations of the Office, following notice and hearing provided for in subsection (a) of this section, a request may be made for rehearing, under such regulations and procedure as the Office may establish, and such recipient shall be afforded an opportunity to present such additional information as may be deemed appropriate and pertinent to the matter involved.

"FINALITY OF DETERMINATIONS

"SEC. 803. In carrying out the functions vested by this title in the Office, its determinations, findings, and conclusions shall, after reasonable notice and opportunity for a hearing, be final and conclusive upon all grants.

"SUBPOENA POWER; AUTHORITY TO HOLD HEARINGS

"SEC. 804. The Office may appoint such hearing examiners or administrative law judges or request the use of such administrative law judges selected by the Office of Personnel Management pursuant to section 3344 of title 5, United States Code, as shall be necessary to carry out the powers and duties under this title. The Office, or upon authorization, any member thereof or any hearing examiner or administrative law judge assigned to or employed thereby shall have the power to hold hearings and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States it may designate.

"PERSONNEL AND ADMINISTRATIVE AUTHORITY

"SEC. 805. (a) The Office is authorized to select, appoint, employ and fix compensation of such officers and employees as shall be necessary to carry out the powers and duties of the Office, the Bureau of Justice Programs, the Institute, the Bureau of Criminal Justice Facilities, and the Bureau of Justice Statistics under this title.

"(b) The Office, the Bureau of Justice Programs, the Institute, the Bureau of Criminal Justice Facilities, and the Bureau of Justice Statistics are authorized, on a reimbursable basis when appropriate, to use the available services, equipment, personnel, and facilities of Federal, State, and local agencies to the extent deemed appropriate after giving due consideration to the effectiveness of such existing services, equipment, personnel, and facilities.

"(c) The Office may arrange with and reimburse the heads of other Federal departments and agencies for the performance of any of the functions under this title.

"(d) The Office, the Bureau of Justice Programs, the Institute, the Bureau of Criminal Justice Facilities, and the Bureau of Justice Statistics in carrying out their respective functions may use grants, contracts or cooperative agreements in accordance with the standards established in the Federal Grant and Cooperative Agreement Act of 1977 (41 U.S.C. 501 et seq.).

"(e) The Office may procure the services of experts and consultants in accordance with section 3109 of title 5, United States Code, relating to appointments in the Federal service, at rates of compensation for individuals not to exceed the daily equivalent of the rate authorized for GS-18 by section 5332 of title 5, United States Code.

"(f) The Office is authorized to appoint pursuant to the Advisory Committee Management Act, but without regard to the remaining provisions of title 5, United States Code, technical or other advisory committees to advise it with respect to the administration of this title as it deems necessary. Members of those committees not otherwise in the employ of the United States, while engaged in advising or attending meetings of the committees shall be compensated at rates to be fixed by the Office but not exceed the daily equivalent of the rate authorized for GS-18 by section 5332 of title 5 of the United States Code, and while away from home or regular place of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of such title 5 for persons in the Government service employed intermittently.

"(g) Payments under this title may be made in installments, and in advance or by way of reimbursement, as may be determined by the Office, and may be used to pay the transportation and subsistence expenses of persons attending conferences or other assemblages notwithstanding the provisions of 31 U.S.C. 1345.

"(h) The Office is authorized to accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services notwithstanding the provisions of 31 U.S.C. 1342. Such individuals shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims.

"TITLE TO PERSONAL PROPERTY

"SEC. 806. Notwithstanding any other provision of law, title to all expendable and nonexpendable personal property purchased with funds made available under this title, including such property purchased with funds made available under this Act as in effect before the date of the enactment of the Justice Assistance Act of 1983, shall vest in the criminal justice agency or nonprofit organization that purchased the property if it certifies to the State office described in Section 506 that it will use the property for criminal justice purposes. If such certification is not made, title to the property shall vest in the State office, which shall seek to have the property used for criminal justice purposes elsewhere in the State prior to using it or disposing of it in any other manner.

"PROHIBITION OF FEDERAL CONTROL OVER STATE AND LOCAL CRIMINAL JUSTICE AGENCIES

"SEC. 807. Nothing in this title or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other criminal justice agency of any State or any political subdivision thereof.

"NONDISCRIMINATION

"SEC. 808. (a) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title.

"(b) Notwithstanding any other provision of law, nothing contained in this title shall be construed to authorize the Office of Justice Assistance—

> *"(1) to require, or condition the availability or amount of a grant upon the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance in any criminal justice agency; or*
>
> *"(2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system or other program.*

"(c) Whenever the Attorney General has reason to believe that a State government or unit of local government has engaged in or is engaging in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in an appropriate United States district court. Such a court may grant as relief any temporary restraining order, preliminary or permanent injunction, or other order, as necessary or appropriate to insure the full enjoyment of the rights described in this section, including the suspension, termination, or repayment of such funds made available under this title as the court may deem appropriate, or placing any further such funds in escrow pending the outcome of the litigation.

"(d) Whenever the Attorney General files a civil action alleging a pattern or practice of discriminatory conduct on the basis of race,

color, religion, national origin, or sex in any program or activity of State government or unit of local government which State government or unit of local government receives funds made available under this title, and the conduct allegedly violates the provisions of this section and neither party within forty-five days after filing has been granted such preliminary relief with regard to the suspension or repayment of funds as may be otherwise available by law, the Office of Justice Assistance shall cause to have suspended further payment of any funds under this title to that specific program or activity alleged by the Attorney General to be in violation of the provisions of this subsection until such time as the court orders resumption of payment.

"RECORDKEEPING REQUIREMENT

"SEC. 809. (a) Each recipient of funds under this title shall keep such records as the Office shall prescribe, including records which fully disclose the amount and disposition by such recipient of the funds, the total cost of the project or undertaking for which such funds are used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

"(b) The Office or any of its duly authorized representatives, shall have access for purpose of audit and examination of any books, documents, papers, and records of the recipients of funds under this title which in the opinion of the Office may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to under this title.

"(c) The Comptroller General of the United States or any of his duly authorized representatives, shall, until the expiration of three years after the completion of the program or project with which the assistance is used, have access for the purpose of audit and examination to any books, documents, papers, and records of recipients of Federal funds under this title which in the opinion of the Comptroller General may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to under this title.

"(d) The provisions of this section shall apply to all recipients of assistance under this title, whether by direct grant, cooperative agreement, or contract under this title or by subgrant or subcontract from primary grantees or contractors under this title.

"CONFIDENTIALITY OF INFORMATION

"SEC. 810. (a) Except as provided by Federal law other than this title, no officer or employee of the Federal Government, and no recipient of assistance under the provisions of this title shall use or reveal any research or statistical information furnished under this title by any person and indentifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this title. Such information and copies thereof shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings.

"(b) All criminal history information collected, stored, or disseminated through support under this title shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Office shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this title, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

"(c) All criminal intelligence systems operating through support under this title shall collect, maintain, and disseminate criminal intelligence information in conformance with policy standards which are prescribed by the Office and which are written to assure that the funding and operation of these systems furthers the purpose of this title and to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals.

"(d) any person violating the provisions of this section, or of any rule, regulation, or order issued thereunder, shall be fined not to exceed $10,000 in addition to any other penalty imposed by law.

"PART I—DEFINITIONS

"DEFINITIONS

"SEC. 901. As used in this title—

"(1) 'criminal justice' means activities pertaining to crime prevention, control, or reduction, or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control, or reduce crime or to apprehend criminals, including juveniles, activities of courts having criminal jurisdiction, and related agencies (including but not limited to prosecutorial and defender services, juvenile delinquency agencies and pretrial service or release agencies), activities of corrections, probation, or parole authorities and related agencies assisting in the rehabilitation, supervision, and care of criminal offenders, and programs relating to the prevention, control, or reduction of narcotic addiction and juvenile delinquency;

"(2) 'State' means any State of the United States, the District of Columbia and the Commonwealth of Puerto Rico;

"(3) 'unit of local government' means any city, county, township, town, borough, parish, village, or other general purpose political subdivision of a State, an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior, any agency of the District of Columbia government or the United States performing law enforcement functions in and for the District of Columbia, and the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands;

"(4) 'public agency' means any State, unit of local government, combination of such States or units, or any department, agency, or instrumentality of any of the foregoing;

"(5) 'criminal history information' includes records and related data, contained in an automated or manual criminal justice information system, compiled by law enforcement agencies for the purpose of indentifying criminal offenders and alleged offenders and maintaining as to such persons records of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release;

"(6) 'evaluation' means the administration and conduct of studies and analyses to determine the impact and value of a project or program in accomplishing the statutory objectives of this title;

"(7) 'Attorney General' means the Attorney General of the United States or his designee;

"(8) 'Assistant Attorney General' means the Assistant Attorney General for Justice Assistance.

"PART J—FUNDING

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 1001. There is authorized to be appropriated to carry out the functions of the Bureau of Justice Statistics such sums as are necessary for the fiscal years ending September 30, 1984, September 30, 1985, September 30, 1986, and September 30, 1987. There is authorized to be appropriated to carry out the functions of the National Institute of Justice such sums as are necessary for the fiscal years ending September 30, 1984, September 30, 1985, September 30, 1986, and September 30, 1987. There is authorized to be appropriated for parts A, B, E, F, G, and H, and for the purposes of carrying out the remaining function of the Office of Justice Assistance other than parts K and M, such sums as are necessary for the fiscal years ending September 30, 1984, September 30, 1985, September 30, 1986, and September 30, 1987. The appropriation authorized for the Bureau of Criminal Justice Facilities or for any function or activity authorized for part G shall not exceed in total $25,000,000 for any fiscal year ending September 30, 1984, September 30, 1985, September 30, 1986, and September 30, 1987. Funds appropriated for any fiscal year may remain available for obligation until expended. There is authorized to be appropriated in each fiscal year such sums as may be necessary to carry out the purposes of part K and part M.

"PART K—PUBLIC SAFETY OFFICERS' DEATH BENEFITS

"PAYMENTS

"SEC. 1101. (a) In any case in which the Office determines, under regulations issued pursuant to this part, that a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty, the Office shall pay a benefit of $50,000 as follows:

"(1) if there is no surviving child of such officer, to the surviving spouse of such officer;

"(2) if there is a surviving child or children and a surviving spouse, one-half to the surviving child or children of such officer in equal shares and one-half to the surviving spouse;

"(3) if there is no surviving spouse, to the child or children of such officer in equal shares; or

"(4) if none of the above, to the dependent parent or parents of such officer in equal shares.

"(b) Whenever the Office determines upon showing of need and prior to final action that the death of a public safety officer is one with respect to which a benefit will probably be paid, the Office may make an interim benefit payment not exceeding $3,000 to the person entitled to receive a benefit under subsection (a) of this section.

"(c) The amount of an interim payment under subsection (b) shall be deducted from the amount of any final benefit paid to such person.

"(d) Where there is no final benefit paid, the recipient of any interim payment under subsection (b) shall be liable for repayment of such amount. The Office may waive all or part of such repayment, considering for this purpose the hardship which would result from such repayment.

"(e) The benefit payable under this part shall be in addition to any other benefit that may be due from any other source, except—

"(1) payments authorized by section 12(k) of the Act of September 1, 1916, as amended (D.C. Code, sec. 4-531(1)); or

"(2) benefits authorized by section 8191 of title 5, United States Code; such beneficiaries shall only receive benefits under that section that are in excess of the benefits received under this part.

"(f) No benefit paid under this part shall be subject to execution or attachment.

"LIMITATIONS

"SEC. 1102. No benefit shall be paid under this part—

"(1) if the death was caused by the intentional misconduct of the public safety officer or by such officer's intention to bring about his death;

"(2) if the public safety officer was voluntarily intoxicated at the time of his death;

"(3) if the public safety officer was performing his duties in a grossly negligent manner at the time of his death; or

"(4) to any person who would otherwise be entitled to a benefit under this person's actions were a substantial contributing factor to the death of the public safety officer.

"DEFINITIONS

"SEC. 1103. As used in this part—

"(1) 'child' means any natural, illegitimate, adopted, or posthumous child or stepchild of a deceased public safety officer who, at the time of the public safety officer's death, is—

"(i) eighteen years of age or under;

"(ii) over eighteen years of age and a student as defined in section 8101 of title 5, United States Code; or

"(iii) over eighteen years of age and incapable of self-support because of physical or mental disability;

"(2) 'dependent' means a person who was substantially reliant for support upon the income of the deceased public safety officer;

"(3) 'fireman' includes a person serving as an officially recognized or designated member of a legally organized volunteer fire department;

"(4) 'intoxication' means a disturbance of mental or physical faculties resulting from the introduction of alcohol into the body as evidenced by—

"(i) a postmortem blood alcohol level of 0.20 per centum or greater;

"(ii) a postmortem blood alcohol level of at least 0.10 per centum but less than 0.20 per centum, unless the Office receives convincing evidence that the public safety officer was not acting in an intoxicated manner immediately prior to his death;

or resulting from drugs or other substances in the body;

"(5) 'law enforcement officer' means a person involved in crime and juvenile delinquency control or reduction, or enforcement of the laws, including, but not limited to, police, corrections, probation, parole, and judicial officers;

"(6) 'public agency' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States, or any unit of local government, department, agency, or instrumentality of any of the foregoing; and

"(7) 'public safety officer' means a person serving a public agency in an official capacity, with or without compensation, as a law enforcement officer or a fireman.

"ADMINISTRATIVE PROVISIONS

"SEC. 1104. (a) The Office is authorized to establish such rules, regulations, and procedures as may be necessary to carry out the purposes of this part. Such rules, regulations, and procedures will be determinative of conflict of laws issues arising under this part. Rules, regulations, and procedures issued under this part may include regulations governing the recognition of agents or other persons representing claimants under this part before the Office. The Office may prescribe the maximum fees which may be charged for services performed in connection with any claim under this part before the Office, and any agreement in violation of such rules and regulations shall be void.

"(b) In making determinations under section 1101, the Office may utilize such administrative and investigative assistance as may be available from State and local agencies. Responsibility for making final determinations shall rest with the Office.

"JUDICIAL REVIEW

"SEC. 1105. The United States Claims Court shall have exclusive jurisdiction over all actions seeking review of the final decisions of the Office under this part.

"PART L—FBI TRAINING OF STATE AND LOCAL CRIMINAL JUSTICE PERSONNEL

"AUTHORITY FOR FBI TO TRAIN STATE AND LOCAL CRIMINAL JUSTICE PERSONNEL

"SEC. 1201. (a) The Director of the Federal Bureau of Investigation is authorized to—

"(1) establish and conduct training programs at the Federal Bureau of Investigation National Academy at Quantico, Virginia, to provide, at the request of a State or unit of local government, training for State and local criminal justice personnel;

"(2) develop new or improved approaches, techniques, systems, equipment, and devices to improve and strengthen criminal justice; and

"(3) assist in conducting, at the request of a State or unit of local government, local and regional training programs for the training of State and local criminal justice personnel engaged in the investigation of crime and the apprehension of criminals. Such training shall be provided only for persons actually employed as State police or highway patrol, police of a unit of local government, sheriffs, and their deputies, and other persons as the State or unit may nominate for police training while such persons are actually employed as officers of such State or unit.

"(b) In the exercise of the functions, powers, and duties established under this section the Director of the Federal Bureau of Investigation shall be under the general authority of the Attorney General.

"(c) Notwithstanding the provisions of subsection (a), the Secretary of the Treasury is authorized to fund and continue to develop, establish and conduct training programs at the Federal Law Enforcement Training Center at Glynco, Georgia, to provide, at the request of a State or unit of local government, training for State and local criminal justice personnel so long as that training does not interfere with the Center's mission to train Federal law enforcement personnel.

"PART M—EMERGENCY FEDERAL LAW ENFORCEMENT ASSISTANCE

"APPLICATION REQUIREMENTS

"SEC. 1301. (a) The Attorney General is authorized to receive from the chief executive of any State a request for designation of a State or local jurisdiction as a law enforcement emergency jurisdiction. Such application shall be submitted in such manner and containing or accompanied by such information as the Attorney General may prescribe. Such application for designation as a law enforcement emergency jurisdiction shall be evaluated by the Attorney General according to such criteria, and on such terms and conditions as he *shall establish and shall publish in the Federal Register prior to the beginning of fiscal year 1984 and each fiscal year thereafter for which appropriations will be available to carry out the program.*

"(b) The Attorney General shall, in accordance with the criteria established, approve or disapprove such application not later than ten days after receiving such application.

"ASSISTANCE PROVIDED

"SEC. 1302. (a) Upon a finding by the Attorney General that a law enforcement emergency exists in accordance with the provisions of section 1301 of this title, the Federal law enforcement community is authorized to provide emergency assistance for the duration of the emergency. The cost of such assistance may be paid by the Office of Justice Assistance from funds appropriated under this part, in accordance with procedures established by the Office and the heads of the participating Federal law enforcement agencies and with the approval of the Attorney General.

"(b) Upon such finding by the Attorney General, the Office of Justice Assistance may provide technical assistance, funds for the lease or rental of specialized equipment and other forms of emergency assistance to the jurisdiction, except that no funds may be used to pay the salaries of local criminal justice personnel or otherwise supplant State or local funds that would in the absence of such Federal funds be made available for law enforcement. The cost of assistance provided under this section shall be paid by the Office of Justice Assistance from funds appropriated under this part. The Federal share of such assistance may be up to 100 per centum of project costs.

"DEFINITIONS

"SEC. 1303. For the purposes of this part—

"(1) the term 'Federal law enforcement assistance' means equipment, training, intelligence information, and technical expertise;

"(2) the term 'Federal law enforcement community' means the heads of—

"(A) the Department of Justice;
"(B) the Internal Revenue Service;
"(C) the Customs Service;
"(D) the National Park Service;
"(E) the Secret Service;
"(F) the Coast Guard;
"(G) the Bureau of Alcohol, Tobacco and Firearms; and
"(H) other Federal agencies with specific statutory authority to investigate violations of Federal criminal laws;

"(3) the term 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands;

"(4) the term 'law enforcement emergency' means an uncommon situation in which State and local resources are inadequate to protect the lives and property of citizens or enforce the criminal law.

"ADMINISTRATIVE REQUIREMENT

"SEC. 1304. The recordkeeping and administrative requirements of section 809 and section 810 shall apply to funds provided under this part.

"PART N—TRANSITION

"CONTINUATION OF RULES, AUTHORITIES, AND PROCEEDINGS

"SEC. 1401. (a) All orders, determinations, rules, regulations, and instructions of the Office of Justice Assistance, Research, and Statistics which are in effect on the date of the enactment of this Act shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by the President or the Attorney General, or his designee, or by operation of law.

"(b) The amendments made to this title by the Justice Assistance Act of 1983 shall not affect any suit, action, or other proceeding commenced by or against the Government before the date of the enactment of such Act.

"(c) Nothing in this title prevents the utilization of funds appropriated for purposes of this title for all activities necessary or appropriate for the review, audit, investigation, and judicial or administrative resolution of audit matters for those grants or contracts that were awarded under this title. The final disposition and dissemination of program and project accomplishments with respect to programs and projects approved in accordance with this title, as in effect before the date of the enactment of the Justice Assistance Act of 1983, may be carried out with funds appropriated for purposes of this title.

"(d) The Assistant Attorney General may award new grants, enter into new contracts or cooperative agreements and otherwise obligate unused or reversionary funds previously appropriated for the purposes of Parts D, E and F of this title as in effect on the day before the date of enactment of the Justice Assistance Act of 1983, or for purposes consistent with this title.

"(e) Notwithstanding any other provisions of law, the Assistant Attorney General shall have all the authority previously vested in the Director of the Office of Justice Assistance, Research, and Statistics and the Administrator of the Law Enforcement Assistance Administration necessary to terminate the activities of the Law Enforcement Assistance Administration and the Office of Justice Assistance, Research, and Statistics, and all provisions of this title, as in effect on the day before the enactment of the Justice Assistance Act of 1983, which are necessary for this purpose remain in effect for the sole purpose of carrying out the termination of these activities.".

UNITED STATES CODE

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TITLE 5: GOVERNMENT ORGANIZATION AND EMPLOYEES

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PART III—EMPLOYEES

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Subpart D—Pay and Allowances

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CHAPTER 53—PAY RATES AND SYSTEMS

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Subchapter II—Executive Schedule Pay Rates

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§ 5314. Positions at level III

Level III of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:

* * * * * * *

Director, Institute for Scientific and Technological Cooperation.

[Director, Office of Justice Assistance, Research, and Statistics.]

Under Secretary of Agriculture for Small Community and Rural Development.

Administrator, Maritime Administration.

* * * * * * *

§ 5315. Positions at level IV

Level IV of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:

* * * * * * *

[Administrator of Law Enforcement Assistance.]

[Director of the National Institute of Justice.]

[Director of the Bureau of Justice Statistics.]

Chief Counsel for Advocacy, Small Business Administration.

* * * * * * *

§ 5316. Positions at level V

Level V of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:

* * * * * * *

Director of the National Institute of Justice.
Director of the Bureau of Justice Statistics.
Director of the Office of Criminal Justice.
Director of the Bureau of Justice Programs.

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UNITED STATES CODE

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

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CHAPTER 85—PRISON-MADE GOODS

Sec.
1761. Transportation or importation.
1762. Marking packages.

§ 1761. Transportation or importation

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[(c) In addition to the exceptions set forth in subsection (b) of this section, this chapter shall also not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners participating in a program of not more than seven pilot projects designated by the Administrator of the Law Enforcement Assistance Administration and who—

[(1) have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows:

[(A) taxes (Federal, State, local);

[(B) reasonable charges for room and board as determined by regulations which shall be issued by the Chief State correctional officer;

[(C) allocations for support of family pursuant to State statute, court order, or agreement by the offender;

[(D) contributions to any fund established by law to compensate the victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages;

[(2) have not solely by their status as offenders, been deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment, such as workmen's compensation. However, such convicts or prisoners shall not be qualified to receive any payments for unemployment compensation while incarcerated, notwithstanding any other provision of the law to the contrary;

[(3) have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment.]

(c) In addition to the exceptions set forth in subsection (b) of this section, this chapter shall also not apply to goods, wares, services or merchandise manufactured, produced, provided or mined by convicts or prisoners participating in a program of not more than twenty projects designated by the Director of the Bureau of Criminal Justice Facilities, who—

(1) have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows—

(A) taxes (Federal, State, local);

(B) reasonable charges for room and board as determined by regulations which shall be issued by the Chief correctional officer of the jurisdiction;

(C) allocations for support of family pursuant to State statute, court order, or agreement by the offender;

(D) contributions to any fund established by law to compensate the victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages;

(2) are entitled to compensation for injury sustained in the course of participation in these projects;

(3) have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment.

(d) The provisions of subsection (c) shall not apply unless—

(1) representatives of local union central bodies or similar labor union organizations have been consulted prior to the initiation of any project otherwise qualifying for any exception created by subsection (c); and

(2) such paid inmate employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services.

* * * * * * *

TITLE 41: PUBLIC CONTRACTS

§ 35. Contracts for materials, etc., exceeding $10,000; representations and stipulations

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) * * *

* * * * * * *

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract *except that this section, or any other law or Executive order containing similar prohibitions against purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of sections 1761(c) and 1761(d) of title 18, United States Code*; and

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TITLE 49: TRANSPORTATION

* * * * * * *

§ 11507. Prison-made property governed by State law

Goods, wares, and merchandise produced or mined in a penal institution or by a prisoner not on parole or probation and transported into and used, sold, or stored in a State or territory or possession of the United States, is subject to the laws of that State, territory, or possession. This section does not apply to commodities produced in a penal institution of the United States Government for its use, *or to commodities produced by a project designated by the Director of the Bureau of Criminal Justice Facilities under section 1761(c) of title 18, United States Code.*

CHANGES IN EXISTING LAW MADE BY TITLE VII OF S. 1762

UNITED STATES CODE

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TITLE 40: PUBLIC BUILDINGS, PROPERTY, AND WORKS

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CHAPTER 10—MANAGEMENT AND DISPOSAL OF GOVERNMENT PROPERTY

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Sec.
484. Disposal of surplus property.

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§ 484. Disposal of surplus property—Supervision and direction

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QUARTERLY REPORTS TO CONGRESS BY ADMINISTRATOR

[(o) The Administrator with respect to personal property donated under subsection (j) of this section, and the head of each executive agency disposing of real property under subsection (k) of this section, shall submit during the calendar quarter following the close of each fiscal year a report to the Senate (or to the Secretary of the Senate if the Senate is not in session) and to the House of Representatives (or to the Clerk of the House if the House is not in session) showing the acquisition cost of all personal property so donated and of all real property so disposed of during the preceding fiscal year.]

(o) The Administrator with respect to personal property donated under subsection (j) of this section and with respect to personal or real property transferred or conveyanced under subsection (p) of this section, and the head of each executive agency disposing of real property under subsection (k) of this section, shall submit during the calendar quarter following the close of each fiscal year a report to the Senate (or to the Secretary of the Senate if the Senate is not in session) and to the House of Representatives (or to the Clerk of the House if the House is not in session) showing the acquisition cost of all personal property so donated and of all real property so disposed of during the preceding fiscal year. Such reports shall also show donations and transfers of property according to State, and may include such other information and recommendations as the Administrator or other executive agency head concerned deems appropriate.

(p)(1) Under such regulations as he may prescribe, the Administrator is authorized in his discretion to transfer or convey to the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Northern Mariana Islands, or any political subdivision or instrumentality thereof, surplus property determined by the Attorney General to be required for correctional facility use by the authorized transferee or grantee under an appropriate program or project for the care or rehabilitation of criminal offenders as approved by the Attorney General. Transfers or conveyance under this authority shall be made by the Administrator without monetary consideration to the United States.

(2) The deed of conveyance of any surplus real property disposed of under the provisions of this subsection—

(A) shall provide that all such property shall be used and maintained for the purpose for which it was conveyed in perpetuity, and that in the event the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the United States, revert to the United States; and

(B) may contain such additional terms, reservations, restrictions, and conditions as may be determined by the Administrator to be necessary to safeguard the interests of the United States.

(3) With respect to surplus real property conveyed pursuant to this subsection, the Administrator is authorized and directed—

(A) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained in any instrument by which such transfer was made;

(B) to reform, correct, or amend any such instrument by the execution of a corrective reformative or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

(C) to (i) grant releases from any of the terms, conditions, reservations, and restrictions contained in, and (ii) convey, quitclaim, or release to the transferee or other eligible user any right or interest reserved to the United States by any instrument by which such transfer was made, if he determines that the property so transferred no longer serves the purpose or which it was transferred, or that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: Provided, That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he or she shall deem necessary to protect or advance the interests of the United States.

CHANGES IN EXISTING LAW MADE BY TITLE VIII OF S. 1762

UNITED STATES CODE

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TITLE 29: LABOR

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CHAPTER 11—LABOR-MANAGEMENT REPORTING AND DISCLOSURE PROCEDURE

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Subchapter IV—Liabilities of and Restrictions on Labor and Management

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Sec.
186. Restrictions on financial transactions.

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§ 186. Restrictions on financial transactions

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PENALTY FOR VIOLATIONS

[(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.]

(d)(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

JURISDICTION OF COURTS

[(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.]

(e) The district courts of the United States and the United States courts of the territories and possessions shall have jurisdiction, for

cause shown, and subject to the provisions of Rule 65 of the Federal Rules of Civil Procedure (relating to notice to opposite party), over—

(1) suits alleging a violation of this section brought by any person directly affected by the alleged violation, and

(2) suits brought by the United States alleging that a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or a joint labor-management trust fund as provided for in clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee violates this section,

to restrain such violations without regard to the provisions of section 6 of the Clayton Act (15 U.S.C. 17), section 20 of such Act (29 U.S.C. 52), and sections 1 through 15 of the Act entitled 'An Act to amend the Judicial Code to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (29 U.S.C. 101–115).

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Subchapter VI—Safeguards for Labor Organizations

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Sec.
504. Prohibition against certain persons holding office; violations and penalties.

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§ 504. Prohibition against certain persons holding office; violations and penalties

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III of IV of this chapter, [or conspiracy to commit any such crimes, shall serve—

[(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

[(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of this chapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.] *any felony involving abuse or misuse of such person's labor organization or employee benefit plan position or employment, or conspiracy to commit any such crimes, shall serve or be permitted to serve—*

(1) as a consultant or adviser to any labor organization,

(2) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, employee, or representative in any capacity of any labor organization,

(3) as a labor relations consultant or adviser to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee of any group or association of employers dealing with any labor organization, or in a position having specific collective bargaining authority or direct responsibility in the area of labor-management relations in any corporation or association engaged in an industry or activity affecting commerce, or

(4) in a position which entitles its occupant to a share of the proceeds of, or as an officer or executive or administrative employee of, any entity whose activities are in whole or substantial part devoted to providing goods or services to any labor organization, or

(5) in any capacity that involves decisionmaking authority concerning, or decisionmaking authority over, or custody of, or control of the moneys, funds, assets, or property of any labor organization,

during or for the period of ten years after such conviction or after the end of such imprisonment, whichever is later, unless the sentencing court on the motion of the person convicted sets a lesser period of at least five years after such conviction or after the end of such imprisonment, whichever is later, and unless prior to the end of such period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the United States Parole Commission determines that such person's service in any capacity referred to in clauses (1) through (5) would not be contrary to the purposes of this Act. Prior to making any such determination the Commission shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the Secretary of Labor and to State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Commission's determination in any such proceeding shall be final. No person shall knowingly hire, retain, employ, or otherwise place *any other person to serve in any capacity in violation of this subsection.*

[(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.]

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

[(c) For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.]

(c) For the purpose of this section—

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

(2) A period of parole shall not be considered as part of a period of imprisonment.

(d) Whenever any person—

(1) by operation of this section, has been barred from office or other position in a labor organization or employee benefit plan as a result of a conviction, and

(2) has filed an appeal of that conviction,

any salary which would be otherwise due such person by virtue of such office or position, shall be placed in escrow by the individual employer or organization responsible for payment of such salary. Payment of such salary into escrow shall continue for the duration of the appeal or for the period of time during which such salary would be otherwise due, whichever period is shorter. Upon the final reversal of such person's conviction on appeal, the amounts in escrow shall be paid to such person. Upon the final sustaining of such person's conviction on appeal, the amounts in escrow shall be returned to the individual employer or organization responsible for payments of those amounts. Upon final reversal of such person's conviction, such person shall no longer be barred by this statute from assuming any position from which such person was previously barred.

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CHAPTER 18—EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

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Sec.
1111. Persons prohibited from holding certain positions.
 (a) Conviction or imprisonment.
 (b) Penalty.
 (c) Definitions.

* * * * * * *

§ 1111. Persons prohibited from holding certain positions

CONVICTION OR IMPRISONMENT

(a) No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of Title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a–9(a)(1) of Title 15, a violation of any provision of this Act, a violation of section 186 of Title 29, a violation of chapter 63 of Title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of Title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959, [or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

[(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or

[(2) as a consultant to any employee benefit plan,

during or for five years after such conviction or after the end of such imprisonment, whichever is the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in paragraph (1) or (2) would not be contrary to the purposes of this subchapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No person shall knowingly permit any other person to serve in any capacity referred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee, of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, and determination by such Board of Parole that such service would be inconsistent with the intention of this section.] *any felony involving abuse or misuse of such person's labor organization or employee benefit plan position or employment, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—*

(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative in any capacity of any employee benefit plan,

(2) as a consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in

whole or substantial part devoted to providing goods or services to any employee benefit plan, or

(3) in any capacity that involves decisionmaking authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan,

during or for the period of ten years after such conviction or after the end of such imprisonment, whichever is later, unless the sentencing court on the motion of the person convicted sets a lesser period of at least five years after such conviction or after the end of such imprisonment, whichever is later, and unless prior to the end of such period, in the case of a person so convicted or imprisoned (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the United States Parole Commission determines that such person's service in any capacity referred to in paragraphs (1) through (3) would not be contrary to the purposes of this title. Prior to making any such determination the Commission shall hold an administrative hearing and shall give notice to such proceeding by certified mail to the Secretary of Labor and to State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Commission's determination in any such proceeding shall be final. No person shall knowingly hire, retain, employ, or otherwise place any other person to serve in any capacity in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, and determination by such Parole Commission that such service would be inconsistent with the intention of this section.

PENALTY

[(b) Any person who intentionally violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.]

(b) Any person who intentionally violates this section shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

DEFINITIONS

[(c) For the purposes of this section:

[(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event.

[(2) The term "consultant" means any person who, for compensation, advises or represents an employee benefit plan or who provides other assistance to such plan, concerning the establishment or operation of such plan.

[(3) A period of parole shall not be considered as part of a period of imprisonment.]

(c) For the purpose of this section—

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

(2) The term "consultant" means any person who, for compensation, advises, or represents an employee benefit plan or who provides other assistance to such plan, concerning the establishment or operation of such plan.

(3) A period of parole shall not be considered as part of a period of imprisonment.

(d) Whenever any person—

(1) by operation of this section, has been barred from office or other position in an employee benefit plan as a result of a conviction, and

(2) has filed an appeal of that conviction,

any salary which would be otherwise due such person by virtue of such office or position, shall be placed in escrow by the individual or organization responsible for payment of such salary. Payment of such salary into escrow shall continue for the duration of the appeal or for the period of time during which such salary would be otherwise due, whichever period is shorter. Upon the final reversal of such person's conviction on appeal, the amounts in escrow shall be paid to such person. Upon the final sustaining of that person's conviction on appeal, the amounts in escrow shall be returned to the individual or organization responsible for payments of those amounts. Upon final reversal of such person's conviction, such person shall no longer be barred by this statute from assuming any position from which such person was previously barred.

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CHANGES IN EXISTING LAW MADE BY TITLE IX OF S. 1762

UNITED STATES CODE

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

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CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.
1961 Definitions.

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§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), section 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering parphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), section 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), [or] (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, *or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;*

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TITLE 31: MONEY AND FINANCE

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CHAPTER 53—MONETARY TRANSACTIONS

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Subchapter II—Records and Reports on Monetary Instruments Transactions

5311. Declaration of purpose.
5312. Definitions and application.
5313. Reports on domestic coins and currency transactions.

5314. Records and reports on foreign financial transactions.
5315. Reports on foreign currency transactions.
5316. Reports on exporting and importing monetary instruments
5317. Search and forfeiture of monetary instruments.
5318. Compliance and exemptions.
5319. Availability of reports.
5320. Injunctions.
5321. Civil penalties.
5322. Criminal penalties.
5323. Rewards for informants.

* * * * * * *

§ 5316. Reports on exporting and importing monetary instruments

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports or has transported, *or attempts to transport or have transported,* monetary instruments of more than $5,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than [$5,000] *$10,000* at one time transported into the United States from or through a place outside the United States.

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§ 5317. Search and forfeiture of monetary instruments

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(b) A customs officer may stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of section 5316 of this title.

[(b)] *(c)* A monetary instrument being transported may be seized and forfeited to the United States Government when a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. A monetary instrument transported by mail or a common carrier, messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the United States Postal Service, common carrier, messenger, or bailee through the time it is delivered to the addressee, intended recipient, or agent of the addressee or intended recipient without being transported further in, or taken out of, the United States.

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§ 5321. Civil penalties

(a)(1) A domestic financial institution, and a partner, director, officer, or employee of a domestic financial institution, willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) is liable to the United States Government for [a civil penalty of not more than $1,000] *a civil penalty of not more than $10,000.* For a violation of section 5318(2) of this title or a regulation prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

§ 5322. Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more [$1,000, imprisoned for not more than one year, or both.] *$50,000, or imprisonment not more than five years, or both.*

§ 5323. Rewards for informants

(a) The Secretary may pay a reward to an individual who provides original information which leads to a recovery of a criminal fine, civil penalty, or forfeiture, which exceeds $50,000, for a violation of this chapter.

(b) The Secretary shall determine the amount of a reward under this section. The Secretary may not award more than 25 per centum of the net amount of the fine, penalty, or forfeiture collected or $150,000, whichever is less.

(c) An officer or employee of the United States, a State, or a local government who provides information described in subsection (a) in the performance of official duties is not eligible for a reward under this section.

(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

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CHANGES IN EXISTING LAW MADE BY TITLE X OF S. 1762

UNITED STATES CODE

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

CHAPTER 1—GENERAL PROVISIONS

Sec.

1. Offenses classified.
2. Principals.
3. Accessory after the fact.
4. Misprision of felony.
5. United States defined.
6. Department and agency defined.
7. Special maritime and territorial jurisdiction of the United States defined.
8. Obligation or other security of the United States defined.
9. Vessel of the United States defined.

10. Interstate commerce and foreign commerce defined.
11. Foreign government defined.
12. United States Postal Service defined.
13. Laws of States adopted for areas within Federal jurisdiction.
14. Applicability to Canal Zone; definition.
15. Obligation or other security of foreign government defined.
16. Crime of violence defined.

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§ 15. Obligation or other security of foreign government defined

The term "obligation or other security of any foreign government" includes, but is not limited to, uncanceled stamps, whether or not demonetized.

§ 16. Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force aganist the person or property of another may be used in the course of committing the offense.

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CHAPTER 2—AIRCRAFT AND MOTOR VEHICLES

Sec.

31. Definitions.
32. Destruction of aircraft or aircraft facilities.
33. Destruction of motor vehicles or motor vehicle facilities.
34. Penalty when death results.
35. Imparting or conveying false information.

§ 31. Definitions

When used in this chapter the term—

"Aircraft engine", "air navigation facility", "appliance", "civil aircraft", "foreign air commerce", "interstate air commerce", "landing area", "overseas air commerce", "propeller", and "spare part" shall have the meaning ascribed to those terms in the Civil Aeronautics Act of 1938, as amended.

"Motor vehicle" means every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers, [or passengers and property;] *passengers and property, or property or cargo;*

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CHAPTER 7—ASSAULT

Sec.

111. Assaulting, resisting, or impeding certain officers or employees.
112. Protection of foreign officials, official guests, and internationally protected persons.
113. Assaults within maritime and territorial jurisdiction.

114. Maiming within maritime and territorial jurisdiction.
115. Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member.

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§ 114. Maiming within maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, and with intent to maim or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or

Whoever, within the special maritime and territorial jurisdiction of the United States, and with like intent, throws or pours upon another person, any scalding water, corrosive acid, or caustic substance—

Shall be fined not more than $1,000 or imprisoned not more than seven years, or both.

§ 115. Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member.

(a) Whoever assaults, kidnaps, or murders, or attempts to kidnap or murder, or threatens to assault, kidnap or murder a member of the immediate family of a United States official, a United States judge, a federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. § 1114, as amended, with intent to impede, intimidate, interfere with, or retaliate against such official, judge or law enforcement officer while he is engaged in or as account of the performance of his official duties, shall be punished as provided in subsection (b).

(b)(1) An assault in violation of this section shall be punished as provided in section 111 of this title.

(2) A kidnaping or attempted kidnaping in violation of this section shall be punished as provided in section 1201 of this title.

(3) A murder or attempted murder in violation of this section shall be punished as provided in sections 1111 and 1113 of this title.

(4) A threat made in violation of this title shall be punished by a fine of not more than $5,000 or imprisonment for a term of not more than five years, or both, except that imprisonment for a threatened assault shall not exceed three years.

(c) As used in this section, the term—

(1) "Federal law enforcement officer" means any officer, agent, or employee of the United States authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law;

(2) "immediate family member" of an individual means—

(A) his spouse, parent, brother or sister, child or person to whom he stands in loco parentis; or

(B) any other person living in his household and related to him by blood or marriage;

(3) "United States judge" means any judicial officer of the United States, and includes a justice of the Supreme Court and a United States magistrate; and

(4) "United States official" means the President, President-elect, Vice President, Vice President-elect, a Member of Congress, a member-elect of Congress, a member of the executive branch who is the head of a department listed in 5 U.S.C. 101, or the Director of The Central Intelligence Agency.

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CHAPTER 19—CONSPIRACY

Sec.
371. Conspiracy to commit offense or to defraud United States.
372. Conspiracy to impede or injure officer.
373. Solicitation to commit a crime of violence.

§ 373. Solicitation to commit a crime of violence

(a) Whoever, with intent that another person engage in conduct constituting a crime of violence in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

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CHAPTER 40—IMPORTATION, MANUFACTURE, DISTRIBUTION AND STORAGE OF EXPLOSIVE MATERIALS

Sec.
841. Definitions.
842. Unlawful acts.
843. Licensing and user permits.[1]
844. Penalties.
845. Exceptions; relief from disabilities.
846. Additional powers of the Secretary.
847. Rules and regulations.

848. Effect on State law.

[1] Analysis does not conform to section catchline.

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§ 844. Penalties

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(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if [personal injury results] *personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,* shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if [death results,] *death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,* shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

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(f) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if [personal injury results] *personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,* shall be imprisoned for not more than twenty years, or fined not more than $20,000, or both; and if [death results] *death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,* shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

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(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years fined not more than $10,000, or both; and if [personal injury results] *personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,* shall be imprisoned for not more than twenty years of fined not more than $20,000, or both; and if [death results] *death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct* *prohibited by this subsection,* shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

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CHAPTER 44—FIREARMS

Sec.
921. Definitions.

922. Unlawful acts.
923. Licensing.
924. Penalties.
925. Exceptions: Relief from disabilities.
926. Rules and regulations.
927. Effect on State law.
928. Separability clause.[1]
929. Use of restricted ammunition.

[1] So in original. Does not conform to section catchline.

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§ 924. Penalties

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[(c) Whoever—

[(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

[(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.]

(c) Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. No

person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

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§ 928. Separability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarily situated or to other circumstances shall not be affected thereby.

§ 929. Use of restricted ammunition

(a) Whoever, during and in relation to the commission of a crime of violence including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device for which he may be prosecuted in a court of the United States, uses or carries any handgun loaded with armor-piercing ammunition as defined in subsection (b), shall, in addition to the punishment provided for the commission of such crime of violence be sentenced to a term of imprisonment for not less than five years. Notwithstanding any other provision of law, the court shall not suspend the sentence of any person convicted of a violation of this subsection, nor place him on probation, nor shall the term of imprisonment run concurrently with any other terms of imprisonment including that imposed for the felony in which the armor-piercing handgun ammunition was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(b) For purposes of this section—

(1) "armor-piercing ammunition" means ammunition which, when or if fired from any handgun used or carried in violation of subsection(a) under the test procedure of the National Institute of Law Enforcement and Criminal Justice Standard for the Ballistics Resistance of Police Body Armor promulgated December, 1978, is determined to be capable of penetrating bullet-resistant apparel or body armor meeting the requirements of Type IIA of Standard NILECJ-STD-0101.01 as formulated by the United States Department of Justice and published in December of 1978; and

(2) "handgun" means any firearm, including a pistol or revolver, originally designed to be fired by the use of a single hand.

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CHAPTER 51—HOMICIDE

Sec.
1111. Murder.
1112. Manslaughter.
1113. Attempt to commit murder or manslaughter.
1114. Protection of officers and employees of the United States.

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§ 1111. Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, *escape, murder, kidnaping, treason, espionage, sabotage,* rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", in which event he shall be sentenced to imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

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§ 1114. Protection of officers and employees of the United States

Whoever kills *or attempts to kill* any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the Secret Service or of the Drug Enforcement Administration, any officer or member of the United States Capitol Police, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculutre or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare, the Consumer Product Safety Commission, Interstate Commerce Commission, the Department of Commerce, or of the Department of Labor, or of the Department of the Interior, or of the Department of Agriculture assigned to perform investigative, inspection, or law enforcement functions, or any officer or employee of the Veterans' Administration asigned to perform investigative or law enforcement functions, [while engaged in the performance of his official duties,] *or any United States probation or pretrial services officer, or any officer or employee of any department or agency within the Intelligence Community (as defined in section 3.4(F) of Executive Order 12333, December 8, 1981, or successor orders) not already covered under the terms of this section,* or on account of the performance of his official duties, or any attorney, liquidator, examiner, claim agent, or other employee of the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurnace Corporation, the Comptroller of the Currency, the Federal Home Loan Bank Board, the Board of Governors of the Federal Reserve System, any Federal Reserve bank, or the National Credit Union Administration, *or any other officer, agency, or employee of the United States designated for coverage under this section in regulations issued by the Attorney General* engaged in or on account of the performance of his official duties shall be punished as provided under sections 1111 and 1112 of this title, *except that any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.*

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CHAPTER 53—INDIANS

Sec.
1151. Indian country defined.
1152. Laws governing.
1153. Offenses committed within Indian country.
1154. Intoxicants dispensed within Indian country.
1155. Intoxicants dispensed on school site.
1156. Intoxicants possessed unlawfully.
1157. Livestock sold or removed.[1]
1158. Counterfeiting Indian Arts and Crafts Board trade mark.
1159. Misrepresentation in sale of products.
1160. Property damaged in committing offense.
1161. Application of Indian liquor laws.
1162. State jurisdiction over offenses committed by or against Indians in the Indian country.
1163. Embezzlement and theft from Indian tribal organizations.
1164. Destroying boundary and warning signs.
1165. Hunting, trapping, or fishing on Indian land.

[1] Pub. L. 85-86, July 10, 1957, 71 Stat. 277, which repealed section 1157 of this title, did not amend analysis to reflect the repeal.

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§ 1153. Offenses committed within Indian country

[Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

[As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

[In addition of the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.]

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, rape, involuntary sodomy, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary, involuntary sodomy, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary, involuntary sodomy, and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

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CHAPTER 55—KIDNAPING

Sec.
1201. Kidnaping.
1202. Ransom money.

§ 1201. Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(36) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(36)); **[**or**]**

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title**[**,**]**; *or*

(5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of his official duties,

shall be punished by imprisonment for any term of years or for life.

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CHAPTER 65—MALICIOUS MISCHIEF

Sec.
1361. Government property or contracts.
1362. Communication lines, stations or systems.
1363. Buildings or property within special maritime and territorial jurisdiction.
1364. Interference with foreign commerce by violence.
1365. Destruction of an energy facility.

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§ 1364. Interference with foreign commerce by violence

Whoever, with intent to prevent, interfere with, or obstruct or attempt to prevent, interfere with, or obstruct the exportation to foreign countries of articles from the United States, injures or destroys, by fire or explosives, such articles or the places where they may be while in such foreign commerce, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

§ 1365. Destruction of an energy facility

(a) Whoever knowingly and willfully damages the property of an energy facility in an amount that in fact exceeds $100,000, or damages the property of an energy facility in any amount and causes a significant interruption or impairment of a function of an energy facility, shall be punishable by a fine of not more than $50,000 or imprisonment for not more than ten years, or both.

(b) Whoever knowingly and willfully damages the property of an energy facility in an amount that in fact exceeds $5,000 shall be punishable by a fine of not more than $25,000, or imprisonment for not more than five years, or both.

(c) For purposes of this section, the term "energy facility" means a facility that is involved in the production, storage, transmission, or distribution of electricity, fuel, or another form or source of energy, or research, development, or demonstration facilities relating thereto, regardless of whether such facility is still under construction or is otherwise not functioning, except a facility subject to the jurisdic-

tion, administration, or in the custody of the Nuclear Regulatory Commission.

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CHAPTER 95—RACKETEERING

Sec.
1951. Interference with commerce by threats or violence.
1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.
1952A. Use of interstate commerce facilities in the commission of murder-for-hire.
1952B. Violent crimes in aid of racketeering activity.
1953. Interstate transportation of wagering paraphernalia.
1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.
1955. Prohibition of illegal gambling businesses.

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§ 1952A. Use of interstate commerce facilities in the commission of murder-for-hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than five years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.

(b) As used in this section—

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; and

(2) "facility of interstate commerce" includes means of transportation and communication.

§ 1952B. Violent crimes in aid of racketeering activity

(a) Whoever, as consideration for the receipt of or as consideration for a promise or agreement to pay anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder or kidnapping, by imprisonment for any term of years or for life or a fine of not more than $50,000, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine of not more than $30,000, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine of not more than $20,000, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine of not more than $5,000, or both;

(5) for attempting or conspiring to commit murder, by imprisonment for not more than ten years or a fine of not more than $10,000, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of not more than $3,000, or both.

(b) As used in this section—

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

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PART II—CRIMINAL PROCEDURE

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[CHAPTER 209—EXTRADITION

[Sec.

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CHAPTER 209—INTERSTATE RENDITION

Sec.
3181. Fugitives from State or Territory to State, District, or Territory.
3182. Fugitives from State, Territory or Possession into extra-territorial jurisdiction of the United States.
3183. Payment of fees and costs.

[§ 3181. Scope and limitation of chapter

[The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.]

[§ 3182.] *§ 3181.* Fugitives from State or Territory to State, District or Territory

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

[§ 3183.] *§ 3182.* Fugitives from State, Territory, or Possession into extraterritorial jurisdiction of United States

Whenever the executive authority of any State, Territory, District, or possession of the United States [or the Panama Canal Zone], demands any American citizen or national as a fugitive from justice who has fled to a country in which the United States exercises extraterritorial jurisdiction, and produces a copy of an indictment found or an affidavit made before a magistrate of the demanding jurisdiction, charging the fugitive so demanded with having committed treason, felony, or other offense, certified as authentic by the Governor or chief magistrate of such demanding jurisdiction, or other person authorized to act, the officer or representative of the United States vested with judicial authority to whom the demand has been made shall cause such fugitive to be arrested and secured, and notify the executive authorities making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.

If no such agent shall appear within three months from the time of the arrest, the prisoner may be discharged.

The agent who receives the fugitive into his custody shall be empowered to transport him to the jurisdiction from which he has fled.

§ 3183. Payment of fees and costs

All costs or expenses incurred in any interstate rendition proceeding and apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

[§ 3184. Fugitives from foreign country to United States

[Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.]

[§ 3185. Fugitives from country under control of United States into the United States

[Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who, having violated the criminal laws in force therein by the commission of any of the offenses enumerated below, departs or flees from justice therein to the United States, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was *committed*.

[(1) Murder and assault with intent to commit murder;

[(2) Counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money;

[(3) Counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same;

[(4) Forgery or altering and uttering what is forged or altered;

[(5) Embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries;

[(6) Larceny or embezzlement of an amount not less than $100 in value;

[(7) Robbery;

[(8) Burglary, defined to be the breaking and entering by nighttime into the house of another person with intent to commit a felony therein;

[(9) Breaking and entering the house or building of another, whether in the day or nighttime, with the intent to commit a felony therein;

[(10) Entering, or breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein;

[(11) Perjury or the subornation of perjury;

[(12) Rape;

[(13) Arson;

[(14) Piracy by the law of nations;

[(15) Murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government;

[(16) Malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life.

[This chapter, so far as applicable, shall govern proceedings authorized by this section. Such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

[No return or surrender shall be made of any person charged with the commission of any offense of a political nature.

[If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.]

[§ 3186. Secretary of State to surrender fugitive

[The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

[Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

[A person so accused who escapes may be retaken in the same manner as any person accused of any offense.]

[§ 3187. Provisional arrest and detention within extraterritorial jurisdiction.

[The provisional arrest and detention of a fugitive, under sections 3042 and 3183 of this title, in advance of the presentation of formal proofs, may be obtained by telegraph upon the request of the authority competent to request the surrender of such fugitive addressed to the authority competent to grant such surrender. Such request shall be accompanied by an express statement that a warrant for the fugitive's arrest has been issued within the jurisdiction of the authority making such request charging the fugitive with the commission of the crime for which his extradition is sought to be obtained.

[No person shall be held in custody under telegraphic request by virtue of this section for more than ninety days.]

[§ 3188. Time of commitment pending extradition

[Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.]

[§ 3189. Place and character of hearing

[Hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public.]

[§ 3190. Evidence on hearing

[Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.]

[§ 3191. Witnesses for indigent fugitives

[On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or magistrate hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States.]

[§ 3192. Protection of accused

[Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safekeeping and protection of the accused.]

[§ 3193. Receiving agent's authority over offenders

[A duly appointed agent to receive, in behalf of the United States, the delivery, by a foreign govenment, of any person accused of crime committed within the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the Several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.]

[§ 3194. Transportation of fugitive by receiving agent

Any agent appointed as provided in section 3182 of this title who receives the fugitive into his custody is empowered to transport him to the State or Territory from which he has fled.]

[§ 3195. Payment of fees and costs

[All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

[All witness fees and costs of every nature in cases of international extradition, including the fees of the magistrate shall be certified by the judge or magistrate before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be.

[The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.]

CHAPTER 210—INTERNATIONAL EXTRADITION

Sec.

3191. Extradition authority in general.
3192. Initial procedure.
3193. Waiver of extradition hearing and consent to removal.
3194. Extradition hearing.
3195. Appeal.
3196. Surrender of a person to a foreign state.
3197. Receipt of a person from a foreign state.
3198. General provisions for chapter.

§ 3191. Extradition authority in general

The United States may extradite a person to a foreign state pursuant to this chapter only if—

(a) there is a treaty concerning extradition between the United States and the foreign state; and

(b) the foreign state requests extraditon within the terms of the applicable treaty.

§ 3192. Initial procedure

(a) IN GENERAL.—The Attorney General may file a complaint charging that a person is extraditable. The Attorney General shall file the complaint in the United States district court—

(1) for the district in which the person may be found; or

(2) for the District of Columbia, if the Attorney General does not know where the person may be found.

(b) COMPLAINT.—The complaint shall be made under oath or affirmation, and shall specify the offense for which extradition is sought. The complaint—

(1) shall be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty; or

(2) if not accompanied by the materials specified in paragraph (1)—

(A) shall contain—

(i) information sufficient to identify the person sought;

(ii) a statement of the essential facts constituting the offense that the person is believed to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

(iii) a description of the circumstances that justify the person's arrest; and

(B) shall contain such other information as is required by the applicable treaty;

and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

(c) ARREST OR SUMMONS.—Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be *taken without unnecessary delay before the nearest available court for an extradition hearing.*

(d) Detention or Release of Arrested Person.—

(1) The court shall order that a person arrested under this section be held in official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release.

(2) Unless otherwise provided by the applicable treaty, if a person is detained pursuant to paragraph (1) in a proceeding in which the complaint is filed under subsection (b)(2), and if, within sixty days of the person's arrest, the court has not received—

(A) the evidence or documents required by the applicable treaty; or

(B) notice that the evidence or documents have been received by the Department of State and will promptly be transmitted to the court;

the court may order that the person be released from official detention pending the extradition hearing.

(3) If the court orders the release of the person pending the extradition hearing, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

§ 3193. Waiver of extradition hearing and consent to removal

(a) Informing the Court of Waiver and Consent.—A person against whom a complaint is filed may waive the requirements of formal extradition proceedings, including an order of surrender, by informing the court that he consents to removal to the foreign state.

(b) Inquiry by the Court.—The court, upon being informed of the person's consent to removal, shall—

(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

(2) address the person to determine whether his consent is—

(A) voluntary, and not the result of a threat or other improper inducement; and

(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

(c) Finding of Consent and Order of Removal.—If the court finds that the person's consent to removal is voluntary and given with full knowledge of its consequences, it shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition. The court shall order that the person be held in official detention until surrendered.

(d) Limitation on Detention Pending Removal.—A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not

removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

§ 3194. Extradition hearing

(a) In General.—The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable, unless the hearing is waived pursuant to section 3193. The purpose of the hearing is limited. The court does not have jurisdiction to determine the merits of the charge against the person by the foreign state or to determine whether the foreign state is seeking the extradition of the person for the purpose of prosecuting or punishing the person for his political opinions. The hearing shall be held as soon as practicable after the arrest of the person or issuance of the summons.

(b) Rights of the Person Sought.—The court shall inform the person of the limited purpose of the hearing, and shall inform him that—

(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

(c) Evidence.—

(1) A deposition, warrant, or other document, or a copy thereof, is admissible as evidence in the hearing if—

(A) it is authenticated in accordance with the provisions of an applicable treaty or law of the United States;

(B) it is authenticated in accordance with the applicable law of the foreign state, and such authentication may be established conclusively by a showing that—

(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and

(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer; or

(C) other evidence is sufficient to enable the court to conclude that the document is authentic.

(2) A certificate of affidavit by an appropriate official of the Department of State is admissible as evidence of the existence of a treaty or its interpretation.

(3) If the applicable treaty requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense had been committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that an offense was committed and that the person sought committed it.

(d) FINDINGS.—The court shall find that the person is extraditable if it finds that—

(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

(3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and

(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of—

(A) the United States;

(B) the State where the fugitive is found; or

(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

(e) POLITICAL OFFENSES AND OFFENSES OF A POLITICAL CHARACTER.—The court shall not find the person extraditable after a hearing under this section if the court finds that the person has established by clear and convincing evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense or an offense of a political character. For the purposes of this subsection, the terms "political offense" and "offense of a political character"—

(1) do not include—

(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;

(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

(C) a serious offense involving an attack against the life, physical integrity, or liberty of an internationally protected person (as defined in section 1116 of this title), including a diplomatic agent;

(D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or submit for the purposes of prosecution a person accused of the offense;

(E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;

(F) an offense that consists of rape;

(G) an attempt or conspiracy to commit an offense described in subparagraphs (A) through (F) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense; and

(2) except in extraordinary circumstances, do not include—

(A) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnaping, the taking of a hostage, or a serious unlawful detention;

(B) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

(C) an attempt or conspiracy to commit an offense described in subparagraphs (A) or (B) of this paragraph, or

participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.

The court shall not take evidence with respect to, or otherwise consider, an issue under this subsection until the court determines the person is otherwise extradictable. Upon motion of the Attorney General or the person sought to be extradited, the United States district court may order the determination of any issue under this subsection by a judge of such court.

(f) Certification of Findings to the Secretary of State.—

(1) If the court finds that the person is extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify its findings, together with a transcript of the proceedings, to the Secretary of State. The court shall order that the person be held in official detention until surrendered to a duly appointed agent of the foreign state, or until the Secretary of State declines to order the person's surrender.

(2) If the court finds that the person is not extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify the findings, together with such report as the court considers appropriate, to the Secretary of State. The Attorney General may commence a new action for extradition of the person only with the agreement of the Secretary of State.

§ 3195. Appeal

(a) In General.—Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal. Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

(b) Detention or Release Pending Appeal.—If the district court found that the person sought is—

(1) extraditable, it shall order that the person be held in official detention pending determination of the appeal, or pending a finding by the court of appeals that the person has established that special circumstances require his release;

(2) not extraditable, it shall order that the person be released pending determination of an appeal unless the court is satisfied that the person is likely to flee or to endanger the safety of any other person or the community.

If the court orders the release of a person pending determination of an appeal, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

(c) Subsequent Review.—No court has jursidiction to review a finding that a person is extraditable unless the person has exhausted his remedies under subsection (a). If the person files a petition for habeas corpus or for other review, he shall specify whether the finding that he is extraditable has been upheld by a court, and, if so, shall specify the court, the date, and the nature of each such proceeding. A court does not have jurisdiction to entertain a person's petition for habeas corpus or for other review if his commitment has

previously been upheld, unless the court finds that the grounds for the petition or appeal could not previously have been presented.

§ 3196. Surrender of a person to a foreign state

(a) Responsibility of the Secretary of State.—If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter—

(1) may order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition;

(2) may order such surrender of the person contingent on the acceptance by the foreign state of such conditions as the Secretary considers necessary to effectuate the purposes of the treaty or the interest of justice;

(3) may decline to order the surrender of the person if the Secretary is persuaded that—

(A) the foreign state is seeking extradition of the person for the purpose of prosecuting or punishing the person because of his political opinions, race, religion, or nationality; or

(B) the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.

The Secretary may order the surrender of a person who is a national of the United States unless such surrender is expressly forbidden by the applicable treaty or by the laws of the United States. A decision of the Secretary under paragraph (1), (2), or (3) is a matter solely within the discretion of the Secretary and is not subject to judicial review: Provided, however, That in determining the application of paragraph (3), the Secretary shall consult with the appropriate bureaus and offices of the Department of State, including the Bureau of Human Rights and Humanitarian Affairs.

(b) Notice of Decision.—The Secretary of State, upon ordering a person's surrender or denying a request for extradition in whole, or in part, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that found the person extraditable. If the Secretary orders the person's surrender, he also shall notify the diplomatic representative of the foreign state on the time limitation on the person's detention that is provided by subsection (c)(2).

(c) Limitation on Detention Pending Decision or Removal.—A person who is found extraditable pursuant to section 3194 may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings—

(1) the Secretary does not order the person's surrender, or decline to order the person's surrender, within forty-five days after his receipt of the court's findings and the transcript of the proceedings; or

(2) the person is not removed from the United States within thirty days after the Secretary ordered the person's surrender.

The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

§ 3197. Receipt of a person from a foreign state

(a) APPOINTMENT AND AUTHORITY OF RECEIVING AGENT.—The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a Federal, State, or local offense. The agent shall have the authority of a United States marshal. The agent shall convey the person directly to the Federal or State jurisdiction that sought his return.

(b) TEMPORARY EXTRADITION TO THE UNITED STATES.—If a foreign state delivers custody of a person accused of a Federal, State, or local offense to an agent of the United States on the condition that the person be returned to the foreign state at the conclusion of criminal proceedings in the United States, the Bureau of Prisons shall hold the person in custody pending the conclusion of the proceedings, and shall then surrender the person to a duly appointed agent of the foreign state. The return of the person to the foreign state is not subject to the requirements of this chapter.

§ 3198. General provisions for chapter

(a) DEFINITIONS.—As used in this chapter—

(1) "court" means—

(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands; or

(B) a United States magistrate authorized to conduct an extradition proceeding;

(2) "foreign state", when used in other than a geographic sense, means the government of a foreign state;

(3) "foreign state", when used in a geographic sense, includes all territory under the jurisdiction of a foreign state, including a colony, dependency, and constituent part of the state; its air space and territorial waters; and vessels or aircraft registered in the state;

(4) "treaty" includes a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent by the Senate; and

(5) "warrant", as used with reference to a foreign state, means any judicial document authorizing the arrest or detention of a person accused or convicted of a crime.

(b) PAYMENT OF FEES AND COSTS.—Unless otherwise specified by treaty, all transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of—

(1) a foreign state, shall be borne by the foreign state unless the Secretary of State directs otherwise;

(2) a State, shall be borne by the State; and

(3) the United States, shall be borne by the United States.

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COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

PUBLIC LAW 91-513; 84 STAT. 1236

* * * * * * *

PART D—OFFENSES AND PENALTIES

Sec. 401. Prohibited acts A—penalties.
Sec. 402. Prohibited acts B—penalties.
Sec. 403. Prohibited acts C—penalties.
Sec. 404. Penalty for simple possession; conditional discharge and expunging of records for first offense.
Sec. 405. Distribution to persons under age twenty-one.
Sec. 406. Attempt and conspiracy.

* * * * * * *

Sec. 413. Robbery of a controlled substance from a pharmacist.

ATTEMPT AND CONSPIRACY

SEC. 406. [Any] *(a) Except as provided in subsection (b), any* person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(b) Whoever violates this subsection relating to an offense under subsection (a), (b), or (c) of section 413 after one or more convictions under such section or under this section relating to an offense under such section, is punishable by imprisonment or fine, or both, which may not exceed the maximum punishment for such offense prescribed in the last sentence of subsection (a) of section 413, the last sentence of subsection (b) of section 413, or the last sentence of subsection (c) of section 413, as the case may be.

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ROBBERY OR BURGLARY OF A CONTROLLED SUBSTANCE FROM A PHARMACY

SEC. *413. (a)(1) Whoever, by force and violence, or by any intimidation, takes, or attempts to take, from the person or presence of another, any material, compound, mixture, or prescription containing any quantity of a controlled substance and belonging to, or in the care, custody, control, management, or possession of any pharmacy or a person registered with the Drug Enforcement Administration under section 202 of the Controlled Substances Act (21 U.S.C. 822) shall be fined not more than $5,000 or imprisoned not less than five years, or both. Whoever violates this subsection after one or more convictions under this subsection or subsection (b) or (c), or one or more convictions under section 406 relating to an offense under this section, shall be fined not more than $10,000 or imprisoned not less than ten years, or both.*

(2) Whoever enters or attempts to enter the premises of a pharmacy or a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822)

with the intent to steal any material, compound, mixture, or prescription containing any quantity of a controlled substance shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned for not less than ten years nor more than life, or both. Whoever violates this subsection after one or more convictions under this subsection or subsection (a) or (c), or one or more convictions under section 406 relating to an offense under this section, shall be fined not more than $20,000 or imprisoned for not less than twenty years.

(c) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, kills or maims any person, shall be imprisoned for not less than twenty years. Whoever violates this subsection after one or more convictions under this subsection or subsection (a) or (b), or one or more convictions under section 406 relating to an offense under this section, shall be imprisoned for not less than forty years.

(d) Notwithstanding any other provision of law, the imposition or execution of any sentence under this section shall not be suspended and probation shall not be granted.

(e) As used in this section, the term "pharmacist" means any person registered in accordance with this Act for the purpose of engaging in commercial activities involving the dispensing of any controlled substance to an ultimate user pursuant to the lawful order of a practitioner.

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TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE

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CHAPTER 119—EVIDENCE; WITNESSES

Sec.

1821. Per diem and mileage generally; subsistence.
1822. Competency of interested persons; share of penalties payable.
1824. Mileage fees under summons as both witness and juror.
1825. Payment of fees.
1826. Recalcitrant witnesses.
1827. Interpreters in courts of the United States.
1828. Special interpretation services.

* * * * * * *

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly broght to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(c) Whoever escapes or attempts to escape from the custody of any facility or from any place in which or to which he is confined pursuant to this section or section 4243 of title 18, or whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both.

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(CHANGES IN EXISTING LAW MADE BY TITLE XI OF S. 1762)

UNITED STATES CODE

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

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CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

Sec.

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215. Receipt of commissions or gifts for procuring loans.
216. [Receipt or charge of commissions or gifts for farm loan, land bank, or small business transactions.] *[Repealed]*

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§215. Receipt of commissions or gifts for procuring loans

[Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.]

(a) Whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, except as provided by law, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value, for himself or for any other person or entity, other than such financial institution, from any person or entity for or in connection with any transaction or business of such financial institution; or

(b) Whoever, except as provided by law, directly or indirectly, gives, offers, or promises anything of value to any officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, or offers or promises any such officer, director, employee, agent, or attorney to give anything of value to any person or entity, other than such financial institution, for or in connection with any transaction or business of such financial institution—

Shall be fined not more than $5,000 or three times the value of anything offered, asked, given, received, or agreed to be given or received, whichever is greater, or imprisoned not more than five years, or both; but if the value of anything offered, asked, given, received, or agreed to be given or received does not exceed $100, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) As used in this section—

(1) "financial institution" means—

(A) any bank the deposits of which are insured by the Federal Deposit Insurance Corporation;

(B) any member, as defined in section 2 of the Federal Home Loan Bank Act, as amended, of the Federal Home Loan Bank System and any Federal Home Loan Bank;

(C) any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;

(D) any credit union the accounts of which are insured by the Administrator of the National Credit Union Administration;

(E) any Federal land bank, Federal land bank association, Federal intermediate credit bank, production credit association, bank for cooperatives; and

(F) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662); and

(2) "bank holding company" or "savings and loan holding company" means any person, corporation, partnership, business trust, association or similar organization which controls a financial institution in such a manner as to be a bank holding

company or a savings and loan holding company under the Bank Holding Company Act Amendments of 1956 (12 U.S.C. 1841) or the Savings and Loan Holding Company Amendments of 1967 (12 U.S.C. 1730a).

(d) This section shall not apply to the payment by a financial institution of the usual salary or director's fee paid to an officer, director, employee, agent, or attorney thereof, or to a reasonable fee paid by such financial institution to such officer, director, employee, agent, or attorney for services rendered to such financial institution.

[§ 216. Receipt or charge of commissions or gifts for farm loan, land bank, or small business transactions

[Whoever, being an officer, director, attorney, or employee of a Federal land bank association, a Federal land bank, or a joint-stock land bank, organized or acting under authority of any law of the United States, or a small business investment company, is a beneficiary of or receives, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of such association or bank, other than the usual salary or director's fee paid to such officer, director, or employee thereof, and a reasonable fee paid by such association or bank to such officer, director, attorney, or employee for services rendered, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

[Whoever causes or procures any Federal land bank, joint-stock land bank or Federal land bank association, organized under any Act of Congress, or any small business investment company, to charge or receive any fee, commission, bonus, gift, or other consideration not specifically authorized, shall be fined not more than $5,000 or imprisoned not more than one year, or both.]

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CHAPTER 25—COUNTERFEITING AND FORGERY

Sec.

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509. Possessing and making plates or stones for Government transportation requests.
510. Securities of the State private entities.
511. Forging endorsements or signature on securities of the United States.

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§ 510. Securities of the States and private entities

(a) Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined not more than $250,000 or imprisoned for not more than ten years, or both.

(b) Whoever makes, receives, possesses, sells or otherwise transfers an implement designed for or particularly suited for making a counterfeit or forged security with the intent that it be so used shall be

punished by a fine of not more than $250,000 or by imprisonment for not more than ten years, or both.

(c) For purposes of this section—

(1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

(2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

(3) the term "security" means—

(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693(c)), money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property;

(B) an instrument evidencing ownership of goods, wares, or merchandise;

(C) any other written instrument commonly known as a security;

(D) a certificate of interest in, certificate of participation in, certificate for, receipt for, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or

(E) a blank form of any of the foregoing;

(4) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association or persons which operates in or the activities of which affect interstate or foreign commerce; and

(5) the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

§ 511. Forging endorsements or signature on securities of the United States

(a) Whoever—

(1) with intent to defraud, forges any endorsement or signature on a security of the United States;

(2) with intent to defraud, passes, utters, or publishes, or attempts to pass, utter, or publish any security of the United States bearing a forged endorsement or signature; or

(3) with knowledge that a security of the United States is stolen or bears a forged endorsement or signature, buys, sells, exchanges, receives, delivers, retains, or conceals any such security of the United States that in fact is stolen or bears a forged endorsement or signature—

shall be fined not more than $250,000 or imprisoned not more than ten years, or both; but if the face value of the security of the United States or the aggregate face value, if more than one security, does not exceed $500 in any of the above offenses, the penalty shall be a fine of not more than $1,000 or imprisonment for not more than one year, or both.

(b) For purposes of this section—

(1) the term "forge" means to create an endorsement or signature which purports to be genuine but is not because it has been falsely signed, made, completed, altered, subjected to a false addition, or subjected to a combination of parts of two or more genuine endorsements or signatures;

(2) the term "security" means (A) an obligation of the United States or (B) any security as defined in section 510(c)(3) of this title.

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CHAPTER 31—EMBEZZLEMENT AND THEFT

Sec.

665. Theft or embezzlement from employment and training funds; improper inducement; obstruction of investigations.

666. Theft or bribery concerning programs receiving Federal funds.

667. Theft of livestock.

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§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, being an agent of an organization, or of a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance, embezzles, steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly without authority converts to his own use or to the use of another, property having a value of $5,000 or more owned by or under the care, custody, or control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000 or an amount equal to twice that which was obtained in violation of this subsection, whichever is greater, or both so imprisoned and fined.

(b) Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not more than $100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined.

(c) Whoever offers, gives, or agrees to give to an agent of an organization or of a State or local government agency, described in sub-

section (a), anything of value for or because of the recipient's conduct in any transaction or matter or any series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned not more than ten years or fined not more than $100,000 or an amount equal to twice that offered, given or agreed to be given, whichever is greater, or both so imprisoned and fined.

(d) For purposes of this section—

(1) "agent" means a person or organization authorized to act on behalf of another person, organization or a government and, in the case of an organization or a government, includes a servant or employee, a partner, director, officer, manager and representative;

(2) "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, and any other association of persons;

(3) "government agency" means a subdivision of the executive, legislative, judicial, or other branch of a government, including a department, independent establishment, commission, administration, authority, board, and bureau; or a corporation or other legal entity established by, and subject to control by, a government or governments for execution of a governmental or intergovernmental program; and

(4) "local" means of or pertaining to a political subdivision within a State.

§ 667. Theft of livestock

Whoever obtains or uses the property of another which has a value of $10,000 or more in connection with the marketing of livestock in interstate or foreign commerce with intent to deprive the other of a right to the property or a benefit to the property or to appropriate the property to his own use or the use of another shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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CHAPTER 63—MAIL FRAUD

Sec.

1341. Frauds and swindles.
1342. Fictitious name and address.[1]
1343. Fraud by wire, radio, or television.
1344. Bank fraud.

[1] So in original. Catchline reads "Fictitious name or address".

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§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1344. Bank fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "federally chartered or insured financial institution" means—

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.

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CHAPTER 87—PRISONS

Sec.
1791. Traffic in contraband articles.
1792. Mutiny, riot, dangerous instrumentalities prohibited.
1793. Possession of contraband articles

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§ 1792. Mutiny, riot, dangerous instrumentalities prohibited

Whoever instigates, connives, willfully attempts to cause, assists, or conspires to cause any mutiny or riot, at any Federal penal or correctional institution, or without the knowledge or consent of the warden or superintendent, conveys into such institution, or from place to place therein any tool, device, or substance designed to cut, abrade, or destroy the materials, or any part thereof, of which any building of such institution is constructed, or any other substance or thing designed to injure or destroy any building, or any part thereof, of such institution; or

Whoever conveys into such institution, or from place to place therein, any firearm, weapon, explosive, or any lethal or poisonous gas, or any other substance or thing designed to kill, injure, or disable any officer, agent, employee, or inmate thereof, or conspires so to do—

Shall be imprisoned not more than ten years.

§ 1793. Possession of contraband articles

(a) Whoever, being an inmate in a Federal penal or correctional institution makes, possesses, procures, receives or otherwise provides himself with any object that may be used as a means of facilitating escape contrary to any rule or regulation promulgated by the Attorney General shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

(b) Whoever, being an inmate of a Federal penal or correctional institution, makes, possesses, procures, receives or otherwise provides himself with any firearm (as defined in section 921 of this title) any other weapon or object intended for use as a weapon, or a narcotic drug as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) contrary to any rule or regulation promulgated by the Attorney General, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both. Notwithstanding any other provision of law, the court shall not suspend any sentence of imprisonment imposed under this subsection, nor may such a sentence run concurrently with any other term of imprisonment including that being served at the time of the offense. No person sentenced to imprisonment under this subsection shall be placed on probation or be eligible for parole during the term of imprisonment imposed herein.

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CHAPTER 103—ROBBERY AND BURGLARY

Sec.
2111. Special maritime and territorial jurisdiction.
2112. Personal property of United States.
2113. Bank robbery and incidental crimes.
2114. Mail, money, or other property of United States.
2115. Post Office.
2116. Railway or steamboat post office.
2117. Breaking or entering carrier facilities.

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§ 2113. Bank robbery and incidental crimes

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[(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.]

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

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CHAPTER 109—SEARCHES AND SEIZURES

Sec.
2231. Assault or resistance.
2232. Destruction or removal of property to prevent seizure.
2233. Rescue of seized property.
2234. Authority exceeded in executing warrant.
2235. Search warrant procured maliciously.
2236. Searches without warrant.

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§ 2232. Destruction or removal of property to prevent seizure

[Whoever, before, during, or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing of any goods, wares, or merchandise by such person, staves, breaks, throws overboard, destroys, or removes the same, shall be fined not more than $2,000 or imprisoned not more than one year, or both.]

Whoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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[CHAPTER 110—SEXUAL EXPLOITATION OF CHILDREN

[Sec.
[2251. Sexual exploitation of children.
[2252. Certain activities relating to material involving the sexual exploitation of minors.
[2253. Definitions for chapter.]

[§ 2251. Sexual exploitation of children

[(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

[(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

[(c) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.]

[§ 2252. Certain activities relating to material involving the sexual exploitation of minors

[(a) Any person who—

[(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—

[(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

[(B) such visual or print medium depicts such conduct; or

[(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

[(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

[(B) such visual or print medium depicts such conduct;

shall be punished as provided in subsection (b) of this section.

[(b) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.]

[§ 2253. Definitions for chapter

[For the purposes of this chapter, the term—

[(1) "minor" means any person under the age of sixteen years;

[(2) "sexually explicit conduct" means actual or simulated—

[(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

[(B) bestiality;

[(C) masturbation;

[(D) sado-masochistic abuse (for the purpose of sexual stimulation); or

[(E) lewd exhibition of the genitals or pubic area of any person;

[(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit; and

[(4) "visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.]

CHAPTER 110—SEXUAL EXPLOITATION OF CHILDREN

Sec.

2251. Definitions for chapter.
2252. Sexual exploitation of children.
2253. Certain activities relating to material involving the sexual exploitation of minors.
2254. Criminal forfeiture.
2255. Civil forfeiture.
2256. Reporting.

§ 2251. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) sado-masochistic abuse;

(D) masturbation; or

(E) a display of the genitals or pubic area of any person for the purpose of arousing or inciting sexual desire;

(3) "simulated" means the explicit depiction of any conduct described in clause (2) of this section which creates the actual appearance of such conduct;

(4) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising; and

(5) "visual or print medium" means any film, photograph, negative, slide, book, magazine, or other visual or print medium.

§ 2252. Sexual exploitation of children

(a) Any person who knowingly employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or

mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(c) Any person who violates this section shall be fined not more than $75,000 or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $150,000 or imprisoned not less than two years nor more than fifteen years, or both.

§ 2253. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails any visual or print medium, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct; or

(2) knowingly receives, sells or distributes any visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium visually depicts such conduct or such visual or print medium is obscene and depicts such conduct;

shall be punished as provided in subsection (b) of this section.

(b)(1) Any person who violates this section shall be fined not more than $75,000 or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $150,000 or imprisoned not less than two years nor more than fifteen years, or both. Any organization which violates this section shall be fined not more than $250,000.

(2) For purposes of this section, the term "organization" means a person other than an individual.

§ 2254. Criminal forfeiture

(a) Whoever violates any provision of section 2252 shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 2252, and (2) any interest in, security of, claim against, or property or contractural right of any kind affording a source of influence over, any enterprise which he has established,

operated, controlled, conducted, or participated in the conduct of, in violation of section 2252.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders of prohibitions, or to take such other action, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c)(1) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person.

(2) All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions thereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General.

(3) The United States shall dispose of all such property as soon as commercially reasonable, making due provision for the rights of innocent persons.

§ 2255. Civil forfeiture

(a) The following property shall be subject to forfeiture by the United States:

(1) any visual or print medium produced, transported, shipped, or received in violation of this chapter; and

(2) any property constituting, or derived from, any proceeds obtained, directly or indirectly, from a violation of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) All provisions of the customs law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney Gener-

al, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

§ 2256. Reporting

Beginning one hundred and twenty days after the date of enactment of this Act, and every year thereafter, the Attorney General shall report to Congress the number of cases and convictions brought under section 2252 of title 18, United States Code, and the dollar amount of any forfeiture of assets under section 2254 of such title.

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CHAPTER 113—STOLEN PROPERTY

Sec.
2311. Definitions.
2312. Transportation of stolen vehicles.
2313. Sale or receipt of stolen vehicles.
2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.
2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps.
2316. Transportation of [cattle] *livestock*.
2317. Sale or receipt of [cattle] *livestock*.
2318. Trafficking in counterfeit labels for phonorecords and copies of motion pictures or other audiovisual works.
2319. Criminal infringement of a copyright.

* * * * * * *

§ 2316. Transportation of [cattle] *livestock*

Whoever transports in interstate or foreign commerce any [cattle] *livestock*, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

§ 2317. Sale or receipt of [cattle] *livestock*

Whoever receives, conceals, stores, barters, buys, sells, or disposes of any [cattle] *livestock*, moving in or constituting a part of interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

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CHAPTER 203—ARREST AND COMMITMENT

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Sec.
3055. Officers' powers to suppress Indian liquor traffic.
3056. Secret Service powers.
3057. Bankruptcy investigations.

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§ 3056. Secret Service powers

(a) Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice President or other officer next in the order of succession to the Office of President, and the Vice President-elect, and the members of their immediate families unless the members decline such protection; protect the person of a former President and his wife during his lifetime, the person of a widow of a former President until her death or remarriage, and minor children of a former President until they reach sixteen years of age, unless such protection is declined; protect the person of a visiting head of a foreign state or foreign government and, at the direction of the President, other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad; detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign government; defect and arrest any person violating any of the provisions of sections 508, 509, *511,* and 871 of this title and, insofar as the Federal Deposit Insurance Corporation, Federal land banks, joint-stock land banks and Federal land bank associations are concerned, of sections 218, 221, 433, 493, 657, 709, 1006, 1007, 1011, 1013, 1014, 1907, and 1909 of this title; execute warrants issued under the authority of the United States; carry firearms; offer and pay rewards for services or information looking toward the apprehension of criminals; pay expenses for unforeseen emergencies of a confidential nature under the direction of the Secretary of the Treasury and accounted for solely on his certificate; and perform such other functions and duties as are authorized by law. In the performance of their duties under this section, the Director, Deputy Director, Assistant Directors, Assistants to the Director, inspectors, and agents of the Secret Service are authorized to make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. Moneys expended from Secret Service appropriations for the purchase of counterfeits and subsequently recovered shall be reimbursed to the appropriation current at the time of deposit.

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CHANGES IN EXISTING LAW MADE BY TITLE XII OF S. 1762

UNITED STATES CODE

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

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CHAPTER 45—FOREIGN RELATIONS

Sec.
951. Agents of foreign governments.

* * * * * * *

§ 951. Agents of foreign governments

(a) Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the [Secretary of State] *Attorney General if required in subsection (b),* shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

(b) The Attorney General shall promulgate rules and regulations establishing requirements for notification.

(c) The Attorney General shall, upon receipt, promptly transmit one copy of each notification statement filed under this section to the Secretary of State for such comment and use as the Secretary of State may determine to be appropriate from the point of view of the foreign relations of the United States. Failure of the Attorney General to do so shall not be a bar to prosecution under this section.

(d) For purposes of this section, the term "agent of a foreign government" means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official, except that such term does not include—

(1) a duly accredited diplomatic or consular officer of a foreign government, who is so recognized by the Department of State;

(2) any officially and publicly acknowledged and sponsored official or representative of a foreign government;

(3) any officially and publicly acknowledged and sponsored member of the staff of, or employee of, an officer, official, or representative described in paragraph (1) or (2), who is not a United States citizen; or

(4) any person engaged in a legal commercial transaction.

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CHAPTER 63—MAIL FRAUD

Sec.
1341. Frauds and swindles.
1342. Fictitious name and address.
1343. Fraud by wire, radio, or television.

* * * * * * *

1345. Injunctions against fraud.

* * * * * * *

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

* * * * * * *

§ 1345. Injunctions against fraud

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a violation of this chapter, the Attorney General may initiate a civil proceeding in a district court of the United States to enjoin such violation. The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

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CHAPTER 211—JURISDICTION AND VENUE

Sec.
3231. District courts.
3232. District of offense—Rule.
3233. Transfer within district—Rule.
3234. Change of venue to another district—Rule.
3235. Venue in capital cases.
3236. Murder or manslaughter.
3237. Offenses begun in one district and completed in another.
3238. Offenses not committed in any district.
[3239. Threatening communications] [*3239. Repealed*].
3240. Creation of new district or division.
3241. Jurisdiction of offenses under certain sections.
3242. Indians committing certain offenses; acts on reservations.
3243. Jurisdiction of State of Kansas over offenses committed by or against Indians on Indian reservations.
3244. Jurisdiction of proceedings relating to transferred offenders.

§ 3237. Offenses begun in one district and completed in another

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

[Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.]

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

[(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206 (1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.]

(b) Notwithstanding the second paragraph of subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where venue for prosecution of an offense described in section 7201 or 7206 (1), (2) or (5) of such Code (whether or not the offense is also described in another provision of law) is based solely on a mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time of the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

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[§ 3239. Threatening communications

[Any defendant indicted under sections 875, 876 or 877 of this title, with respect to communications originating in the United States, shall, upon motion duly made, be entitled as of right to be tried in the district in which the matter mailed or otherwise transmitted was first set in motion, in the mails or in commerce between the States.]

* * * * * * *

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec.

2510. Definitions.
2511. Interception and disclosure of wire or oral communications prohibited.
2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.
2513. Confiscation of wire or oral communication intercepting devices.

[2514. Repealed.]
2515. Prohibition of use as evidence of intercepted wire or oral communications.
2516. Authorization for interception of wire or oral communications.
2517. Authorization for disclosure and use of intercepted wire or oral communications.
2518. Procedure for interception of wire or oral communications.
2519. Reports concerning intercepted wire or oral communications.
2520. Recovery of civil damages authorized.

* * * * * * *

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, *Deputy Attorney General, Associate Attorney General,* or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

* * * * * * *

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contents), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information **[**section 1503**]** *sections 1503, 1512, and 1513* (influencing injuring an officer, juror, or witness generally), section 15 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), *section 1343 (fraud by wire, radio, or television), section 2252 or 2253 (sexual exploitation of children),* sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault);

* * * * * * *

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; **[**or**]**

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions); or

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[(g)] *(h)* Any conspiracy to commit any of the foregoing offenses.

*   *   *   *   *   *   *

§ 2518. Procedure for interception of wire or oral communications

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(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, *the Deputy Attorney General, the Associate Attorney General,* or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

[(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and]

(a) an emergency situation exists that involves—

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

*   *   *   *   *   *   *

PART II—CRIMINAL PROCEDURE

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CHAPTER 224—PROTECTION OF WITNESSES

Sec.
3521. Witness relocation and protection.
3522. Reimbursement of expenses.
3523. Definition for chapter.

§ 3521. Witness relocation and protection

(a) Relocation.—The Attorney General may provide for the relocation or protection of a government witness or a potential government witness in a official proceeding if the Attorney General determines that an offense described in section 1512 or 1513, or a State or local offense that is similar in nature or that involves a crime of violence directed at a witness, is likely to be committed. The Attorney General may also provide for the relocation or protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered.

(b) Related Protective Measures.—In connection with the relocation or protection of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General may take any action he determines to be necessary to protect such person from bodily injury, and otherwise to assure his health, safety, and welfare, for as long as, in the judgment of the Attorney General, such danger exists. The Attorney General may—

(1) provide suitable official documents to enable a person relocated to establish a new identity;

(2) provide housing for the person relocated or protected;

(3) provide for the transportation of household furniture and other personal property to the new residence of the person relocated;

(4) provide a tax free subsistence payment, in a sum established in regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

(5) assist the person relocated in obtaining employment; and

(6) refuse to disclose the identity or location of the person relocated or protected, or any other concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure.

(c) Civil Action Against a Relocated Person.—Notwithstanding the provisions of subsection (b)(6), if a person relocated under this section is named as a defendant in a civil cause of action, arising prior to the person's relocation, for damages resulting from bodily injury, property damage, or injury to business, process in the civil proceeding may be served upon the Attorney General. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person relocated at his last known address. If a judgment in such an action is entered against the person relocated, the Attorney General shall determine whether the person has made reasonable efforts to comply with the provisions of that judgment. The Attorney General shall take affirmative steps to urge the person

relocated to comply with any judgment rendered. If the Attorney General determines that the person has not made reasonable efforts to comply with the provisions of the judgment, he may, in his discretion, after weighing the danger to the person relocated, disclose the identity and location of that person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery. Any such disclosure or nondisclosure by the Attorney General shall not subject the government to liability in any action based upon the consequences thereof.

§ 3522. Reimbursement of expenses

The provision of transportation, housing, subsistence, or other assistance to a person under section 3521 may be conditioned by the Attorney General upon reimbursement of expenses in whole or in part to the United States by a State or local government.

§ 3523. Definition for chapter

As used in this subchapter "government" includes the Federal Government and a State or local government.

* * * * * * *

CHAPTER 235—APPEAL

Sec.

3731. Appeal by United States.
3732. Taking of appeal; notice; time—Rule.
3733. Assignment of errors—Rule.
3734. Bill of exceptions abolished—Rule.
3735. Bail on appeal or certiorari—Rule.
3736. Certiorari—Rule.
3737. Record—Rule.
3738. Docketing appeal and record—Rule.
3739. Supervision—Rule.
3740. Argument—Rule.
3741. Harmless error and plain error—Rule.

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information *or granting a new trial after verdict or judgment,* as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * * * * * *

CHAPTER 403—JUVENILE DELINQUENCY

Sec.

5031. Definitions.
5032. Delinquency proceedings in district courts; transfer for criminal prosecution.

5033. Custody prior to appearance before magistrate.
5034. Duties of magistrate.
5035. Detention prior to disposition.
5036. Speedy trial.
5037. Dispositional hearing.
5038. Use of juvenile records.
5039. Commitment.
5040. Support.
5041. Parole.
5042. Revocation of parole or probation.

* * * * * * *

§ 5032. Delinquency proceedings in district courts; transfer for criminal prosecution

[A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to an appropriate district court of the United States that the juvenile court or other appropriate court of a State (1) does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, or (2) does not have available programs and services adequate for the needs of juveniles.]

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 841, 925(a), 955, or 959 of title 21, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State.

If an alleged juvenile delinquent is not surrendered to the authorities of a State or the District of Columbia pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile [sixteen] *fifteen* years and older alleged to have committed an act after his [sixteenth] *fifteenth* birthday which if committed by an adult would be a felony [punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death,] *that is a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21,* criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice[.] *; however, a juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense, or would be an offense described in section 32, 81, 844 (d), (e), (f), (h), (i) or 2275 of this title, and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this subsection or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution.*

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter.

Any proceedings against a juvenile under this chapter or as an adult shall not be commenced until any prior juvenile court records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior record, or that the juvenile's record is unavailable and why it is unavailable.

Whenever a juvenile is adjudged delinquent pursuant to the provisions of this chapter, the specific acts which the juvenile has been found to have committed shall be described as part of the official record of the proceedings and part of the juvenile's official record.

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§ 5038. Use of juvenile records

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[(d) Unless a juvenile who is taken into custody is prosecuted as an adult—

[(1) neither the fingerprints nor a photograph shall be taken without the written consent of the judge; and

[(2) neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding.]

(d) Whenever a juvenile is found guilty of committing an act which if committed by an adult would be a felony that is a crime of violence or an offense described in section 841, 952(a), 955 or 959 of title 21, such juvenile shall be fingerprinted and photographed. Fingerprints and photographs of a juvenile who is not prosecuted as an adult shall be made available only in accordance with the provisions of subsection (a) of this section. Fingerprints and photographs of a juvenile who is prosecuted as an adult shall be made available in the manner applicable to adult defendants.

(e) Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding.

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ORGANIZED CRIME CONTROL ACT OF 1970

PUBLIC LAW 91-452; 84 STAT. 922

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[TITLE V—PROCTECTED FACILITIES FOR HOUSING GOVERNMENT WITNESSES

[SEC. 501. The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity.

[SEC. 502. The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.

[SEC. 503. As used in this title, "Government" means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses.

[SEC. 504. There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title.]

MINORITY VIEWS OF SENATOR MATHIAS

The proponents of the sentencing reform contained in title II of S. 1762 base their proposal upon two observations about the Federal criminal justice system with which hardly anyone disagrees. First, there is too much disparity in criminal sentences. Second, sentences to imprisonment are too indeterminate in duration.

Disagreement arises with respect to how best to reduce the disparity and indeterminacy. I believe that the solution provided by title II is an illusory one. It would replace today's unstructured sentencing practices with an inflexible and potentially costly guidelines system.

The Federal judges and the U.S. Parole Commission are two of the most visible actors in our current sentencing system. Not surprisingly, they are the targets of this bill, which would abolish the latter, and consign the former to the task of operating a sentencing decision machine designed and built by somebody else.

Underlying title II is a profound mistrust of the Federal bench. This attitude assumes that Federal judges, acting through the Judicial Conference, would be unwilling or unable to draw up sentencing guidelines if instructed to do so by the Congress. It further assumes that Federal judges would not conscientiously apply voluntary guidelines, but instead must be stripped of their traditional sentencing discretion, and instructed to adhere to preordained guidelines except in the most extraordinary circumstances. All of this overlooks what seems to me to be obvious: the cooperation of the bench is an essential ingredient in any effective sentencing reform. The Judicial Conference's skepticism about this bill, and the Committee's rejection of the sensible alternatives which the judges have proposed, do not augur well for the success of this bold experiment.

Of course, by drastically reducing judicial discretion in sentencing, title II in no way eliminates discretion from the system. It merely displaces it from the courtroom, where it is exercised under the scrutiny of the public, to other venues. It will turn up in the offices of the United States Attorneys, whose individual charging and plea-bargaining policies will dictate the sentence for the vast majority of defendants, who plead guilty. It will creep into the work of the probation officers, who will, under this bill, have the awesome responsibility of transforming a complex array of facts about the offender and his or her offense into one box on a grid of "offense and offender characteristics." And it will, of course, become the daily bread of the United States Sentencing Commission, a body of Presidential appointees without life tenure. I doubt that the public will be better served when instead of a U.S. District Judge, all of these people—and therefore, no one of them—are responsible for the sentence imposed upon a Federal criminal defendant.

Nor will the Sentencing Commission's responsibilities end with the creation of sentencing guidelines. This new bureaucracy will be empowered to promulgate regulations on a vast array of issues which are today confided to judicial discretion. Without evidence that the Federal bench is incompetent to decide such questions such as when sentences should be modified on humanitarian grounds, the justification for the powers which the bill gives to the Sentencing Commission in these collateral areas is not persuasive. It is ironic that some of the Senate's most vociferous foes of big government have lent their support to this proposal to create another Federal bureaucracy with a sweeping charter to impose solutions for problems which may not really exist.

I have described this bill as a budget buster, and nothing in the consideration which we have given it in this Congress has caused me to modify my views. If enacted, title II will increase Federal expenditures in several ways. It would create a multi-million dollar Sentencing Commission with a permanent charter. It would transfer the responsibility for post-release supervision from the relatively efficient Parole Commission to the Federal courts, necessitating hundreds or perhaps thousands of jury trials per year on contempt petitions. Most significantly, it would do absolutely nothing to reverse the alarming trend toward more and more indiscriminate use of incarceration in the Federal prisons, which are already bulging with their highest populations in history, despite recent evidence of a leveling off or decline in crime rates. The report accompanying the bill professes "neutrality" toward the appropriateness of incarceration; the Committee rejected an amendment which would have required the imposition of the least severe appropriate sanction in each case. The Committee also refused to direct the Sentencing Commission to design its guidelines to avoid increases in the prison population, or in the average sentence served by Federal prisoners. Finally, the Committee rejected safety valve provisions which would have permitted modifications of sentences where needed to prevent serious overcrowding of prison facilities. These actions suggest that the proponents of this legislation are not sufficiently serious about the need to build in safeguards to protect against the fiscal and social costs of overreliance on incarceration. Anti-crime rhetoric for today's consumption is more evident in this bill than prudent planning to minimize the burden on tomorrow's taxpayers.

Title II occupies less than one-third of this 387-page bill. Some of the remainder of S. 1762, particularly the justice assistance provisions of title VI, includes important initiatives in the fight against crime. Other provisions will offer the public more rhetoric than useful resources. What most strikingly characterizes title II are unanswered questions about the intentions, and the likely effects, of this sweeping sentencing reform. These unresolved problems led to my vote against S. 1762 in committee. When the full Senate turns to this legislation, I commend these questions to the thoughtful attention of my colleagues.

ADDITIONAL VIEWS OF SENATOR JOHN P. EAST

A significant disparity exists between the sentences that courts impose on similarly situated offenders. As the main body of this report demonstrates, S. 1962, by implementing a comprehensive Federal criminal law, may begin to rectify this injustice by making it less possible to subject offenders guilty of similar crimes to radically different penalties. Also, if the system functions according to plan, it will let both the victim and the community know how long a defendant will be incarcerated. No longer will the victim of a crime, who heard the judge give a stiff sentence to his assailant, have the shock of meeting the offender on the street just a few years later because of his early release on parole. A victim will at least know at the time of sentencing how long an offender will have to serve.

I think it important, however, to point out that the sentencing provisions of S. 1762, while they may help ensure that the law does not treat some criminals unfairly, will not necessarily address other major concerns of society or of the victims of violent crime. The main body of this report places most of its emphasis on removing disparities in sentencing. But removing such disparities does not by itself mean that sentences will be fair either to the victims of crime, to society at large, or even to the criminal himself. What the victims of crime have been protesting is not that similarly situated offenders receive different penalties. Rather, they have been protesting that violent offenders have been receiving light sentences, sentences grossly disproportionate to the gravity of the crimes they have committed. One victim's father, for instance, told the President's Task Force on Victims of Crime that "the man who strangled my daughter to death will only serve four years." His concern was not that some criminals were being treated unfairly and receiving much stiffer penalties than others. Instead, he resented that his daughter's life had been valued so cheaply. Although society also suffers when courts apply penalties in a disparate manner, the present crisis in our criminal justice system arises more from releasing too many violent offenders back onto the streets. Finally, a narrow concern for removing disparities in sentencing might fail to protect the real interests of offenders. We could, for example, equalize the law by giving the same stiff penalty, such as life imprisonment, to all petty thieves. That would hardly be a just approach. In the alternative, we could equalize the law by giving the most lenient possible sentence to all such offenders, but, as Plato reminds us in his *Gorgias,* a wrongdoer who escapes punishment suffers a greater evil than one who is punished. Just punishment fits the crime, and I fear that under these new guidelines sentences could end up being much too low.

The situation in Minnesota gives some grounds to my fear. Citing a recent study published by the National Academy of Sciences, this

Committee's report observes that Minnesota's program of sentencing reform has succeeded in achieving "its goal of reducing unwarrented sentencing disparity, increasing emphasis on punishment for violent offenders, and avoiding unintended burdens on the prison system." It them adds that "this finding is especially important to the consideration of this bill because of the substantial similarity between the Minnesota legislation and the federal sentencing reform measure."

I agree that it is important to look at Minnesota. It comes the closest of any State to providing a case study of how well the reforms set forth in this bill would work. But I do not find the picture in Minnesota nearly as rosy as the one the National Academy of Sciences has painted. Minnesota continues to have significant problems even with its new system.

This past June, in fact, the Minnesota Sentencing Guidelines Commission gave preliminary approval to lowering recommended sentences for many offenses because prisons in that State have become intolerably overcrowded. The original implementation of Minnesota's system of sentencing guidelines was supposed to have averted such overcrowding, but State officials project that their five adult-male prisons will be full by January 1985. The new set of guidelines proposed last June would place less emphasis on the role a defendant's criminal history plays in determining his sentence, despite the fact that habitual offenders pose a greater danger to society. Under the proposed guidelines, even violent offenders would receive significantly lighter sentences. Thus, while the proposed penalty for first-degree criminal sexual conduct and first degree-assault would remain at 43 months, the recommended sentence for a person with a lengthy criminal history would decrease from 113 to 84 months. The guidelines would leave the penalty for aggravated robbery the same—24 months—but reduce from 97 to 52 months the recommendation for repeat offenders. These changes hardly seem consistent with an "increasing emphasis on punishment for violent offenders."

While other factors may have contributed to prison overcrowding, it seems that the Minnesota reforms played a key role in worsening this problem. Prosecutors who have complained loudly about how lenient the sentencing guidelines were have since figured out how to make the system work for them. Under the Minnesota guidelines, an offender's sentence depends on two factors: the seriousness of the offense and the length of the offender's criminal record. Prosecutors have found that they can lengthen a person's criminal record by charging him with more than one crime at a time, and then insisting on pleas to more than one of these crimes, rather than dropping all but one as they did in the past. Under the procedure of "making book on offenders", first-time offenders receive sentences no longer than they used to, but, should they be brought to court again, they have a longer criminal history and receive a harsher criminal sentence. In a letter to Minnesota State legislators dated April 4, 1983, Stephen Rathke, the Chairman of the Minnesota Sentencing Guidelines Commission, listed "making book against offenders" as one of three major factors that had caused the Commission to miscalculate the future prison in Minnesota. Said Mr. Rathke:

> Prosecutors are dismissing fewer felony cases in an apparent and successful effort to build criminal history scores. The percentage of offenders with criminal history scores of four or more has increased greatly. This leads both to more commitments and to longer prison sentences.

Prosecutors who saw that the reforms would impose much higher sentences can hardly be faulted for attempting to keep repeat offenders off the streets. Repeat offenders commit a significantly large proportion of the crimes in this country and effective criminal reforms must focus on the dangers that they pose. From the standpoint of fighting crime, it is irrational to do what the Commission has done—not only to reduce sentences for some offenses but also to recommend that criminal history play a lesser role across the board. Since its search for available prison beds has led the Minnesota Commission to depart from the primary concern for fighting crime, I do not think we ought to characterize the Minnesota program as particularly successful.

With respect to the length of sentences, the provisions of S. 1762 that govern the establishment of sentencing guidelines at least represent a considerable improvement upon those contained in S. 1630 during the 97th Congress. Unlike the language of S. 1630, S. 1762 does not mandate that the Sentencing Commission set guidelines for prison terms on the basis of sentences actually served under current law, except in exigent circumstances. As Senator Biden pointed out on the floor of the Senate, this language would virtually have frozen in current sentencing patterns—patterns in which the average prison term served in 62 months for homicide, 52 month for rape, and about two years for miscellaneous felonies in general.

Now, thanks to the efforts of Senator Denton, new language has been added requiring the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." Furthermore, the Commission is asked independently to "develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code," which include deterrence, protection of the general public, and the need to provide sentences that are sufficiently severe to promote respect for law and provide just punishment.

This is a good start. We are no longer embodying in Federal law a statutory mandate that current prison sentences be frozen or reduced. But neither is there any mandate that will force the Sentencing Commission to deal with serious offenses more seriously. Whether sentences for violent crimes, particuarly reprehensible offenses, and repetitively criminal conduct, go up, go down, or stay the same will be more or less determined by "the luck of the draw."

At present we simply have no idea what the sentencing guidelines will look like. We do not know, for example, how many categories of sentences will apply to any given crime. Experts in the field indicate that criminologists are presently considering several possible models. Unfortunately, Congress has given the Sentencing Commission little guidance in this area. When the Commission comes back with its proposals, Congress should take a close look at them.

The attitudes toward crime taken by the members of the Sentencing Commission will be the most significant factor in determining the direction of punishment. The attitudes of Federal judges will be another. But at no point does Congress take its statutorily mandated maximum sentences with enough seriousness to create some numerical nexus, however, tenuous, between statutory sentences and actual sentences.

We can only hope that the Sentencing Commission heeds our suggestion that violent, heinous, or repetitive criminal conduct be dealt with more severely than is the case under current law.

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